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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 541

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, PETITIONER,

vs.

H. N. BORDEN.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR CERTIORARI FILED OCTOBER 19, 1962
CERTIORARI GRANTED DECEMBER 17, 1962

SUPREME COURT OF THE UNITED STATES

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LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, PETITIONER,

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H. N. BORDEN.

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[fol. 1]

IN THE ..... JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

No. 2803-F

H. N. Borden,

vs.

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada,

and

Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

Plaintiff's Original Petition—Filed September 2, 1955

To the Honorable Judge of Said Court:

Now Comes H. N. Borden, hereinafter called Plaintiff, complaining of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, hereinafter called "United Association," and their local union, Number 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, hereinafter called "Local Union 100," both Defendants hereinafter referred to as Defendants, and for cause would respectfully show the Court the following:

I.

That Plaintiff is a resident of the Parish of Caddo, State of Louisiana, and the Defendant, United Association, is an unincorporated association doing business within the State of Texas, and that the Defendant, Local Union 100, is an unincorporated association, doing business within the State of Texas, and that the Defendant, Local Union 100, may be served with process by serving the same on John P. Galvin,

Secretary of Local Union 100, 2706½ South Ervay, Dallas, [fol. 2] Dallas County, Texas; and the Defendant, United Association, may be served with process by serving the same on Jeff Mullally, General Organizer, 7054, Glen Hills Road, Fort Worth, Tarrant County, Texas.

II.

That heretofore the Plaintiff was and still is at this time a member of the Defendant, United Association, and of the Defendant, Local Union 100.

III.

That heretofore on the 15th day of September, 1953, Plaintiff was promised a job on the construction of the Republic National Bank Building at Dallas, Dallas County, Texas, by Farwell Construction Company by and through their superintendent, Jack Heath, and their foreman, A. J. Thurman.

IV.

That prior to the job offering to Plaintiff, Plaintiff was a member of the Defendant, United Association, and of their local union in Galveston, Galveston County, Texas.

V.

That the Plaintiff came to Dallas in September of 1953 and that immediately he went to Local Union 100 of the United Association, with the purpose of being accepted in order that he might then go to work on the job opportunity promised by Farwell Construction Company.

VI.

That prior to the arrival in Dallas of the Plaintiff, he had secured a clearance card from his local union in Galveston, Galveston County, Texas stating that he was in good stand-[fol. 3] ing and should be admitted to any other local union of the United Association, but that on his arrival in Dallas, the local union, Number 100, refused to accept the clearance card.

VII.

That thereafter on the 9th day of October, the Defendant, Local Union 100, finally did accept the clearance card of the Plaintiff, but they then and thereafter and have continued since to willfully and discriminatorily refuse to allow the Plaintiff to go to work on the Republic Bank Building, and that such refusal to allow Plaintiff to work was without any cause whatsoever.

VIII.

That the willful, malicious and discriminatory acts of the Defendant, Local Union 100, and of the Defendant, United Association, constituted an interference with the Plaintiff's right to contract, and his inherent right to labor.

IX.

That the willful and malicious acts of the Defendants herein complained of, constitute a conspiracy and propose to wrongfully violate the right of the Plaintiff to contract and work, performing his labor and skills for those who sought to employ him.

X.

That the acts of the Defendants, Local Union 100 and the United Association, constituted and do constitute a monopoly through the restraint of free pursuit of the lawful trade or occupation of the Plaintiff, and that the restraint here imposed, was unreasonable and unjustified.

[fol. 4]

XI.

That the Plaintiff has submitted his complaint to the Defendants at a meeting held October 18, 1954, but that there was no remedy whatsoever offered him by either of the Defendants, and in fact there was only a threat made against the Plaintiff that if he should continue his complaint, complaining of their malicious and discriminating acts, then he would be discharged from the union.

XII.

The acts of the Defendants were in violation of Article 5207a of the Texas Revised Civil Statutes of 1925 in that the acts of the Defendants constituted an interference and a denial of the right of the Plaintiff to work and bargain freely with his employer.

XIII.

That the Plaintiff, as a member of the local and of the international unions, had a contract with both of the Defendants and implied in such contract and in the membership there is a promise by the Defendants not to discriminate unfairly or unjustly or to deny a member a right to work, but that the Defendants' acts here complained of did breach this implied promise in the contract.

XIV.

Plaintiff would further show that as a result of the Defendants' acts, he has suffered great mental anguish, having been damaged in the sum of Five Thousand Dollars ($5,000.00).

XV.

As a result of the Defendants' acts, the Plaintiff was deprived of steady employment from September 15, 1953, to [fol. 5] approximately September 15, 1954, a period of one year in which the Plaintiff would have earned, had he been allowed to work on the Republic National Bank Building, an amount of Seven Thousand and Ninety-Seven Dollars ($7,097.00).

XVI.

As a result of being denied the job opportunity on the Republic National Bank, the Plaintiff did attempt to find other work and did so find other work, to-wit: Kiefer Plumbing Company, from which the Plaintiff earned $1,229.60; Rose Brothers Plumbing Company, from which the Plaintiff earned $830.60; Spencer Brothers Plumbing Company, from which the Plaintiff earned $997.30; but

that the total of the amount earned during this period was $4,039.50 less than he would have earned, had he been allowed to work on the Republic National Bank Building in Dallas, Dallas County, Texas, during the same period, to-wit: September 15, 1953, to September 15, 1954.

XVII.

That because of the malicious and discriminatory acts here complained of and the afterward approval of the acts by both of the Defendants, the Defendants should be assessed as punitive damages for an example of their malicious conduct, Ten Thousand Dollars ($10,000.00).

Wherefore, premises considered, Plaintiff prays that he have judgment for Four Thousand Thirty-Nine Dollars and Fifty Cents ($4,039.50) as damages for loss of earnings; Five Thousand Dollars ($5,000.00) as damages for mental anguish and suffering; and Ten Thousand Dollars ($10,000.00) as punitive damages against the Defendants, [fol. 6] being a total of Nineteen Thousand Thirty-Nine Dollars and Fifty Cents ($19,039.50), together with all costs and for such other and further relief, both general and special, legal and equitable, as the Court might deem him to be justly entitled.

Lyne, Blanchette & Smith, By William L. Hutchison,
Attorneys for Plaintiff.

[fol. 7]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS

116TH JUDICIAL DISTRICT

No. 2803-F

H. N. BORDEN,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

and

LOCAL UNION 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA.

ANSWER OF LOCAL UNION 100—Filed September 24, 1955

Comes now Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (hereinafter styled Local Union) and files this its Plea in Abatement and Answer to the petition heretofore filed herein by H. N. Borden and respectfully would show:

1.

The matters of which plaintiff complains are matters within the exclusive jurisdiction of the National Labor Relations Board pursuant to the Federal Labor Management Relations Act of 1947 (Taft-Hartley), which statute provides in pertinent part that it is an unfair labor practice for a labor organization or its agents:

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right [fol. 8] of a labor organization to prescribe its own rules with respect to the acquisition or retention of

membership therein; . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . ."

The cited federal legislation pre-empts this field and deprives this Honorable Court of the State of Texas of jurisdiction to hear and determine the matters alleged in plaintiff's petition for the reason that exclusive jurisdiction of said matters are, by the federal statute, lodged in the federal administrative agency and the federal court, and plaintiff has wholly failed to seek, utilize, or exhaust remedies available before the federal agency and federal court under the federal law.

Wherefore, defendant local union 100 respectfully prays that this Plea in Abatement be granted and that this suit be in all things abated and dismissed as to this defendant, and for such other relief as to which this defendant may be entitled.

Mullinax & Wells, By L. N. D. Wells, Jr.

State of Texas
County of Dallas

Before me, the undersigned authority, on this day personally appeared L. N. D. Wells, Jr., who on oath deposed and said that he has read the above Plea in Abatement filed on behalf of the defendant Local Union 100 and that the facts set out therein are true.

Sworn to and subscribed before me this 23rd day of [fol. 9] September, 1955.

Dorothy McFarland, Notary Public in and for Dallas County, Texas.

(Seal)

Subject to the aforesaid plea and without waiving same, defendant local 100 files this further answer:

2.

This defendant, Local Union 100, pursuant to Rule 58, Texas Rules of Civil Procedure, hereby adopts by reference

the Plea in Abatement and the exceptions, and each and every one of same, heretofore filed herein in the Answer of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and of each of said pleas and exceptions prays judgment of the Court, all as is more fully set out in said Answer of said United Association.

3.

Local 100 excepts to the petition herein for the reason that it nowhere is alleged that plaintiff has sought to utilize or exhaust remedies available before the NLRB under the Federal Labor Management Relations Act of 1947 (Taft-Hartley), and of this exception defendant prays judgment of the Court.

4.

Defendant Local Union 100 excepts to the allegations of paragraph VII of the petition herein for the reason that it fails to specify what officer, agent or employee of this defendant refused to allow the plaintiff to go to work on the Republic Bank Building, or the manner in which said unidentified person or persons acted or refused to act [fol. 10] with reference to plaintiff's going to work on the Republic Bank Building, or time or place of said alleged refusal to permit plaintiff to go to work; and the allegation of said paragraph is a mere conclusion of the pleader without facts alleged in support thereof, and of this exception defendant prays judgment of the Court.

5.

Defendant union excepts to the allegations of paragraph III of the petition herein for the reason that it is nowhere alleged that either Jack Heath or A. J. Thurman were authorized on behalf of the Farwell Construction Company to promise a job on the construction of the Republic National Bank Building, or to hire plaintiff on said job, and there is therefore no allegation of any binding agreement

to give plaintiff a job on said building or that plaintiff had any right to work on said building, and of this exception defendant prays judgment of the Court.

6.

This defendant excepts to the allegations of paragraph III of the petition herein for the reason that it is not alleged what kind of a job was allegedly offered to plaintiff, nor is it alleged whether or not any conditions were placed on the obtaining of said job, nor is it alleged what work plaintiff was promised or what compensation he would obtain therefrom, nor is it alleged when plaintiff was to go to work, what hours he would work, or how long he would work pursuant to said promise, or what wage rate he would receive pursuant to said promise, and of this exception defendant prays judgment of the Court.

[fol. 11]

7.

Defendant denies each and every allegation of plaintiff's petition herein and puts plaintiff to his proof of said allegations, and each of them.

8.

Further answering defendant Local 100 would show that at no time during the period which defendant claims he was damaged were all the members of defendant Local Union employed, and that as a matter of fact there were substantial periods of unemployment for substantial numbers of the members of the local union and that this union owes no duty to plaintiff in these circumstances to prefer plaintiff for employment over other members of the local union, and that plaintiff by his claim here is seeking to obtain privilege or preferment over and above his brothers in the union, many of whom had been out of employment longer than he, and that this defendant union owes no duty of such privileged or preferential treatment to plaintiff.

Wherefore, having fully answered herein, defendant Local Union 100 prays that plaintiff take nothing by his suit, and that this defendant be discharged with its costs,

and for such other relief as to which this defendant may be entitled.

Mullinax & Wells, By L. N. D. Wells, Jr., 1716 Jackson Street, Dallas 1, Texas, Attorneys for Local Union 100.

[fol. 12]

IN THE 116TH JUDICIAL DISTRICT COURT

OF DALLAS COUNTY, TEXAS

No. 2803

H. N. BORDEN,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA,

and

LOCAL UNION 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA.

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION—
Filed March 29, 1956

To the Honorable Judge of Said Court:

Now Comes H. N. Borden, hereinafter called "Plaintiff," and with leave of the Court first had files this his First Amended Original Petition, complaining of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, hereinafter called "United Association," and their local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, hereinafter called [fol. 13] "Local Union 100," both Defendants being hereinafter collectively referred to as "Defendants," and for cause would respectfully show the Court the following:

I.

That Plaintiff is a resident of the Parish of Caddo, State of Louisiana, and Defendant, United Association, is an unincorporated association doing business within the State of Texas, and that the Defendant, Local Union 100, is an unincorporated association doing business within the State of Texas; and that the Defendant, Local Union 100, may be served with process by serving the same on John P. Galvin, Secretary of Local Union 100, 2706½ South Ervay Street, Dallas County, Texas; and the Defendant, United Association, may be served with process by serving the same on Jeff Mullally, General Organizer, 7054 Glen Hills Road, Fort Worth, Tarrant County, Texas.

II.

That heretofore, the Plaintiff was and still is at this time a member of the Defendant, United Association, and of the Defendant, Local Union 100.

III.

That heretofore, on the 15th day of September, 1953, Plaintiff was promised a job opportunity on the construction of the Republic National Bank Building at Dallas, Dallas County, Texas, by Farwell Construction Company, by and through their Superintendent, Jack Heath, and their Foreman, A. G. Thurman, each of whom was authorized so to agree.

IV.

That prior to the job offering to Plaintiff, Plaintiff was a member of the United Association and of their local union in Galveston, Galveston County, Texas.

[fol. 14]

V.

That the Plaintiff came to Dallas in September of 1953, and that upon his arrival in Dallas, he immediately went to Local Union 100 of the United Association with the purpose of being accepted in order that he might then go to work on the job opportunity promised to him by Farwell Construction Company.

VI.

That upon Plaintiff's arrival at the local headquarters of Local Union 100, a call for this Plaintiff had been placed to said local headquarters for Local Union 100 of the United Association, such call being placed by the above named A. G. Thurman, and such call calling for this Plaintiff to go to work upon the Republic National Bank Building; that the above call for Plaintiff was placed with one Cleo Lanham, Agent and Business Manager for the Local Union, and who was vested with the duties and authority of placing members of the Union with their various job opportunities.

VII.

That prior to the arrival in Dallas, Plaintiff had secured a clearance card from his local union in Galveston, Galveston County, Texas, stating that he was in good standing and should be admitted to any other local union of the United Association, but that upon his arrival in Dallas, the Local Union 100, by and through its then Agent and Business Manager, Cleo Lanham, whose duty it was to accept Plaintiff, refused to accept such clearance card.

VIII.

That thereafter, on the 9th day of October, 1953, the Defendant, Local Union 100, finally did accept such clearance card of the Plaintiff, but at that time Plaintiff was [fol. 15] cursed and abused by Cleo Lanham in his capacity as Business Manager and Agent of the Local Union 100 and of the United Association, and which Cleo Lanham, in his capacity as Business Manager and Agent of the Defendants, did thereafter state and inform the Plaintiff that as far as he, the said Lanham, had control and as long as he had any such power, he would in his capacity as Agent and Business Manager of the Union see to it that this Plaintiff would never be allowed to work on the job opportunity promised to him by Farwell Construction Company.

IX.

That Local Union 100 and the United Association, both being the Defendants herein, have acquiesced in the conduct of their Agent and Business Manager, and have affirmatively ratified said conduct by their subsequent conduct in that the Plaintiff was not and has never been offered any remedy even though Defendants knew of such conduct of their Agent Lanham and Plaintiff had informed Defendants of such act; nor was the Plaintiff ever allowed to work on the Republic Bank Building; and that after such conduct and acts of said Defendants, they thereafter and have continued since to willfully and discriminatorily refuse to allow the Plaintiff to work on the Republic Bank Building and that such refusal to allow the Plaintiff to work was without any cause or reason whatsoever; all of which acts were after the Defendants had actual knowledge of the conduct and acts of their Agent and Business Manager, Cleo Lanham.

X.

That the willful, malicious, and discriminatory acts of the Defendant, Local Union 100, and of the Defendant, United Association, by and through each of their Agents, consti- [fol. 16] tuted an interference with the Plaintiff's right to contract and his inherent right to labor.

XI.

That the willful and malicious acts of the Defendants herein complained of constitute a conspiracy and proposed to wrongfully violate the right of the Plaintiff to contract and work, performing his labor and skills for those who sought to employ him.

XII.

That the acts of the Defendants, Local Union 100 and United Association, constituted and do constitute a monopoly through the restraint of free pursuit of lawful trade or occupation of the Plaintiff; and that the restraint here imposed, being the refusal of the allowance of the Plaintiff to work, was unreasonable and unjustified.

XIII.

That the Plaintiff has submitted his complaint to the Defendants at a meeting held October 18, 1954, and that there was no remedy offered to this Plaintiff whatsoever by either of the Defendants, and in fact, there was only a threat made against the Plaintiff, such threat being that if he, the Plaintiff, should continue his complaint any further, complaining of the malicious and the discriminating acts of each of the Defendants herein, then and in that event the Plaintiff would then be discharged from the Union altogether.

XIV.

That the acts of the Defendants herein complained of were in violation of Article 5207-A of the Texas Revised Civil Statutes of 1925 and that the acts of the Defendants constituted an interference when denial of the right of the [fol. 17] Plaintiff to work and bargain freely with his employer was made.

XV.

That the Plaintiff as a member of the Local Union and of the International Union had a contract with both of the Defendants; and implied in such contract and in the membership therein is a promise by the Defendants not to discriminate unfairly or unjustly or to deny a member a right to work, but that the Defendants' act here complained of did breach this implied promise in the contract with each of the Defendants herein.

XVI.

That Plaintiff would further show that as a result of the Defendants' acts, he has suffered great mental anguish, having been damaged in the sum of Five Thousand Dollars ($5,000.00).

XVII.

That as a result of the Defendants' acts, the Plaintiff was deprived of steady employment from September 15, 1953, to approximately September 15, 1954, a period of one year, in which the Plaintiff would have earned, had he been

allowed to work on the Republic National Bank Building, an amount of Seven Thousand and Ninety-Seven Dollars ($7,097.00).

XVIII.

As a result of being denied the job opportunity on the Republic National Bank Building, the Plaintiff did attempt to find other work and did so find other work, to-wit: Kiefer Plumbing Company, from which the Plaintiff earned $1,229.60; Rose Brothers Plumbing Company, from which the Plaintiff earned $830.60; Spencer Brothers Plumbing [fol. 18] Company, from which the Plaintiff earned $997.30; but that the total of the amount earned during this period was $4,039.50 less than he would have earned had he been allowed to work on the Republic National Bank Building in Dallas, Dallas County, Texas, during the same period, to-wit: September 15, 1953, to September 15, 1954.

XIX.

That because of the malicious and discriminatory acts here complained of and the afterward approval of the acts by both of the Defendants, the Defendants should be assessed as punitive damages for an example of their wanton and malicious conduct, Ten Thousand Dollars ($10,000.00).

Wherefore, Premises Considered, Plaintiff prays that he have judgment against these Defendants for Four Thousand Thirty-Nine Dollars and Fifty Cents ($4,039.50) as damages for loss of earnings; Five Thousand Dollars ($5,000.00) as damages for mental anguish and suffering; and Ten Thousand Dollars ($10,000.00) as punitive damages against the Defendants, being a total of Nineteen Thousand Thirty-Nine Dollars and Fifty Cents ($19,039.50), together with all costs and for such other and further relief, both general and special, legal and equitable, as the Court might deem him to be justly entitled.

Lyne, Blanchette & Smith, by Robert W. Smith, Attorneys for Plaintiff.

A copy of Plaintiff's First Amended Original Petition was delivered to attorneys for Defendants this 29th day of March, 1956.

Robert W. Smith

[fol. 20]

IN THE 116TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

No. 2803

H. N. BORDEN,

VS.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA.

ORDER OF DISMISSAL—February 15, 1957

This cause came on for hearing before the Honorable Dallas Blankenship, Judge of the 101st Judicial District Court of Dallas County, Texas, on November 30, 1956, and plaintiff and defendants each appeared by their respective attorneys, whereupon defendants presented to the Court their pleas and exceptions contained in answers filed herein, and it appearing to the Court that plaintiff is a member of defendant labor organizations and thus has no standing to sue said organizations for money damages; and it further appearing that jurisdiction of a suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the exclusive jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, and accordingly this Court is without jurisdiction;

It Is Therefore Ordered, Adjudged and Decreed that this cause be, and it hereby is, dismissed at plaintiff's costs.

To which action and ruling of the Court plaintiff then and there in open court excepted, and he then and there in open court gave notice of appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas [fol. 21] sitting at Dallas.

Date Entered: February 15th, 1957.

Dallas A. Blankenship, Judge, 101st Judicial District Court, Dallas County, Texas.

Approved as to Form:

William L. Hutchison, Attorney for Plaintiff.

L. N. D. Wells, Jr., Attorney for Defendant.

[fol. 22]

IN THE COURT OF APPEALS OF TEXAS

FIFTH SUPREME JUDICIAL DISTRICT

From a District Court of Dallas County.

No. 15,319

H. N. BORDEN, Appellant,

v.

UNITED ASSN. OF JOURNEYMEN & APPRENTICES et al., Appellees.

OPINION—April 11, 1958

This is a damage suit. The appellant is a member of the appellees who are unincorporated labor unions. He brought suit against such unions for damages growing out of a dispute wherein it is alleged that the appellant was arbitrarily and maliciously disallowed by said appellees to be employed by Farwell Construction Company, which had offered appellant an opportunity to work. Appellees filed a plea in abatement based on two counts: (1) That a member is not allowed to sue the union, and (2) the actions complained of were within the exclusive jurisdiction of the Labor Management Relations Act. On hearing before the court the plea in abatement was sustained on both counts and the cause dismissed. This appeal has been duly perfected from such judgment and order, appellant here briefing two points of error.

Point 1 in substance asserts error in the trial court's holding that a member of an unincorporated union cannot sue the union for money damages since not legally allowed to do so. Countered in substance by the union that a member has no standing to sue it for money damages allegedly arising from dereliction of an agent of the union.

The general rule is that an employee cannot sue his union. However there are exceptions to the general rule. Three necessary facts must be established before such suit can be maintained, to-wit: (a) A property right or its equivalent must be involved; (b) a violation of the Constitution or Charter in the acts complained of must be shown; and (c) a resort to the internal processes of the organization for redress must have been exhausted or shown [fol. 23] to be futile. Ducing v. Nuzzo, 29 NYS 2d 882. Ordinarily hardship to the member is not in issue and acts in conformity with the Constitution and rules of the union are ordinarily enforcible. The record here shows no complaint by Borden against the agent of the union who is alleged by Borden to have wronged him. In Brotherhood of Railroad Trainmen v. Allen, 230 SW 2d 235, error ref., cert. den. 340 U.S. 934, 71 S. Ct. 501, rehearing denied 341 U.S. 906, 71 S. Ct. 611, it is held that:

"If Weiss and Andrews, or either of them, committed any fraud or failed in his or their duty to properly represent the appellees and as the result of which they sustained damages, they could be held accountable to the appellees therefor, because a principal can sue his agent for such dereliction of duty. This principle is so well established that it needs no authorities cited to support the same. The appellee's comembers, if they received money to which they were not entitled but to which the appellees were, the appellees would have a cause of action against such members as individuals. The appellees and the other several hundred thousand members are principals, and we are of the opinion that one or more principals cannot sue their coprincipals and require them to respond in damages for the dereliction of duty of a joint agent. Weiss and Andrews were just as much the agents of appellees as they were the agents of the other members of the brotherhood. The Brotherhood being

a benefit fraternal society, its assets are held jointly between all of its members, including the appellees, and they say that only twenty members received a part of the award that they were not entitled to. None of the other several hundred thousand members received any part of the fund, nor did they take any part in its distribution; and to require them to bear a proportionate part of the loss sustained by the appellees from the dereliction of the joint agents of all in order that they might receive the full amount that they claim they were entitled to receive under the agreement, is not a sound legal principle. To hold otherwise it would furnish a means by which the Brotherhood [fol. 24] could be destroyed by one or more of its own members. They are, in effect, suing themselves (Citing cases)." See 87 C.J.S. 867, note 11 citing above case.

Appellant Borden not having shown facts necessary to bring his claim within the exceptions before he can sue the unions, he cannot recover. The holding in the Allen case is applicable here. Point 1 is overruled.

Point 2 asserts error in holding the acts complained of by Borden are within the jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, since the acts complained of by Borden are not within the coverage of such Act. Countered that the NLRB has exclusive jurisdiction of a claim by a workman based on the *union's attempt to wrongfully deprive him of employment:*

Local Union 100 by way of abatement asserts that the matters here involved are within the exclusive jurisdiction of the NLRB under the FLMR Act of 1947 (Taft-Hartley Act) which provides it is an unfair labor practice for the union or its agents "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; • • • (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) • • • ." And that such preempted the field and deprives the State Courts of jurisdiction here and that Borden has not sought or exhausted such available remedies; also pled the

same reasons and facts as exceptions, and as defense on the merits.

The acts complained of in the pleadings were that the union accepted his clearance card, but then and thereafter has wrongfully and discriminately refused to allow him to go to work on the Republic Bank Building without any cause whatsoever, which constituted an interference with his right to contract and his inherent right to labor; that such acts of this Local 100 constituted a monopoly through restraint of his free pursuit of the lawful trade or occupa-[fol. 25] tion which was unreasonable and unjustified; that he submitted his complaint to the unions at a meeting on December 18, 1954, but no remedy was offered him—only a threat that if he continued to complain he would be discharged from the union, all in violation of Art. 5207a V.A. C.S.; which constituted an interference with and denial of his right to work and bargain freely with his employer; pled specifically a loss of job opportunities in the sums set out and sought actual damages totaling $4,039.50 and $10,000.00 exemplary damages. Also pled he did not take such job opportunities because of the threatened expulsion and because of failure of union clearance.

Borden contends that he complains of malicious and discriminatory and willful acts of the unions in refusing to allow him to pursue his employment even after they knew of the occurrences complained of; that his employment, although he had the job opportunity, was never consummated because of the union's threatened expulsion based on his failure to get union clearance.

The union contended that the acts asserted by Borden were within sec. 158(b) (1) and 158(b) (2) of the FLMR Act and that such Act preempts the field so as to deprive State Courts of jurisdiction which in substance provides that a union or its agents shall not interfere with the rights guaranteed by sec. 157; that sec. 157 gives employees the right of self organization, to form, join or assist organizations to bargain collectively and to engage in other concerted activities, or for any other mutual benefit; also gives the employee the right to refrain from such authorized acts except to the extent that such right might be affected by an agreement requiring membership in a labor organization as

a condition of employment as authorized by sec. 158 (a) (3), Title 29 USCA. Sec. 158, Unfair Labor Practices. Sec. 158 (a) (2) provides that it shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization.

[fol. 26] Section 158 (b) (1) and 158 (b) (2) provide that it shall be an unfair practice for a labor organization, or its agents, (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in sec. 157, and this title provided that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances. (2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to when membership in such organization has been denied or terminated on some ground other than his failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The record here shows that the employer placed a call for Borden and it was thereafter that the unilateral acts of the agents of the union solely caused Borden's failure to work on the job involved. There was no issue of conspiracy raised by the evidence, and the matters involved in this action are, in our opinion, within the coverage of the Labor Management Relations Act. Point 2 is overruled.

Appellee has briefed a counterpoint numbered three, in substance that the Court of Civil Appeals lacks jurisdiction by reason of appellant's failure to perfect his appeal by timely filing an appeal bond.

The transcript shows the final judgment was entered February 15, 1957 and the bond bears the District Clerk's filemark of March 12, 1957, and the certificate of approval of the bond by the District Clerk is also dated March 12, 1957. The appeal bond was therefore duly perfected under Rule 356, R.C.P.

The appeal bond here involved having been filed within [fol. 27] the time required in Rule 356, R.C.P., and approved by the District Clerk, even though defective, perfected the appeal. If defective, it was subject to amendment any time the question should be raised, and, if properly amended, such amendment relates back to the date of the filing of the original bond. The counterpoint is overruled.

Finding no reversible error in the trial court's judgment, it is

Affirmed.

Cramer, Associate Justice.

Delivered April 11, 1958.

[fol. 28]

IN THE COURT OF CIVIL APPEALS OF TEXAS

FIFTH SUPREME JUDICIAL DISTRICT

On Rehearing.

From a District Court of Dallas County.

No. 15,319

H. N. BOBDEN, Appellant,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, et al., Appellees.

OPINION—July 25, 1958

Our opinion heretofore delivered in this case is withdrawn and the following opinion is substituted.

This is a damage suit brought in the 101st District Court of the State of Texas against two unincorporated labor unions by H. N. Borden, appellant, who alleges that he is a member of both organizations. The two organizations are United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the

United States and Canada, and Local Union 100 of said Association.

The trial court dismissed the suit on the grounds that (1) appellant "is a member of defendant labor organizations and thus has no standing to sue said organizations for money damages"; and (2) "jurisdiction of a suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the exclusive jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, and accordingly this court is without jurisdiction."

In his petition appellant makes the following allegations: on September 15, 1953 he was promised a job in the construction of the Republic National Bank Building in Dallas, [fol. 29] Texas, by Farwell Construction Company through the Company's superintendent and also one of the Company's foremen; appellant thereupon obtained a clearance from his local union in Galveston, Texas, where he then lived, came to Dallas, presented himself to Local Union 100 at Dallas for the purpose of being accepted in order that he might go to work on the job promised by Farwell Construction Company; Local Union No. 100 at first refused to accept appellant's clearance card, but finally on October 9, 1953 did accept said clearance card; nevertheless said Local Union No. 100, in violation of Art. 5207a V.A.C.S., did then and has since continued willfully, maliciously, discriminatorily and without cause to refuse to allow appellant to go to work on the job offered him in the construction of the Republic Bank Building; appellant thereafter sought redress by submitting his claims to appellee unions at a meeting held October 18, 1954, but no remedy was offered to him by either union—in fact only a threat made against him that if he should continue his complaint he would be expelled from the unions; appellant then sought and obtained employment elsewhere at a wage less than he would have been paid on the Republic National Bank job; and that the difference in wages during the period of time involved was $4,039.50. Appellant asked judgment for $4,039.50 damages for lost earnings, $5,000.00

as damages for mental anguish and suffering, and $1,000.00 as exemplary damages.

The only questions before us on this appeal are: (1) whether appellant had a right to sue appellee unions of which he was a member; and (2) whether such suit might be brought in a State court of the State of Texas.

The two labor unions, though unincorporated, are legal entities subject to being sued. International Association of Machinists v. Gonzales, 78 S. Ct. 923; United Mine Workers of America v. Coronado Coal Company, 259 U.S. 344, 66 L. ed. 975, 42 Sup. Court 570. In International Longshoremen and Warehousemen's Union, Decisions and Orders of N.L.R.B. Vol. 79, p. 1508, Note 40, (1948), it is said:

> "The common law concept of an unincorporated labor [fol. 30] organization as a group of individuals having no separate entity apart from its members has been discarded to the extent that it was not already outmoded in modern jurisprudence—by the Labor Management Relations Act, 1947. It is clear that the Act treats labor organizations for all practical purposes as juridical entities."

The action may be a suit for damages. International Association of Machinists, et al., v. Gonzales, (Sup.Court of United States, May 26, 1958); 78 S.Ct. 923; Selles v. International Brotherhood of Teamsters, etc., 314 P. 2d 456.

In this case appellant is asserting a property right—the right to seek employment, work, and earn a living. International Printing Pressman and Assistants' Union of North America v. Smith, 198 SW 2d 729; 145 Texas 399; Gurtov, et al., v. Williams, et al., 105 SW 2d 328. Under the circumstances he has a right to sue the labor unions though he is a member of the unions. Choate v. Grand International Brotherhood of Locomotive Engineers (Sup.Court of Texas, July 9, 1958); Lundine v. McKinney, 183 SW 2d 265; McCantz, v. Brotherhood of Painters Decorators and Paperhangers, 13 SW 2d 902; Dusing v. Nuzzo, 29 N.Y.S. 2d 882; Nissen v. Int. Brotherhood, 141 A. L. R. 598, 610; Art. 5154G, Secs. 4 and 5, V.A.C.S., Art.

5207a V. A. C. S. Appellant's first point on appeal is sustained.

With reference to appellant's second point on appeal, it is the contention of appellee that the National Labor Relations Board has exclusive jurisdiction of appellant's claim, hence suit may not be brought in a State Court. Appellee relies on 29 U.S.C.A. Sec. 158 (b)(2), Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Act.

We are unable to agree with appellee. Appellant's suit is a tort action for damages. The National Labor Relations Board does not have jurisdiction of such claims. In United [fol. 31] Construction Workers v. Laburnum Const. Corp., 347 U.S. 656; 74 Sup. Court 833, it is said:

> "Petitioners contend that the Act of 1947 has occupied the labor relations field so completely that no regulatory agency other than the National Labor Relations Board and no court may assert jurisdiction over unfair labor practices as defined by it, unless expressly authorized by Congress to do so. They claim that state Courts accordingly are excluded not only from enjoining future unfair labor practices and thus colliding with the Board, as occurred in Garner v. Teamsters Union, 346 U.S. 485, 74 S. Ct. 161, but that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. • • • • *Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct.* For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the langauge of the Act and there is positive support for it in our decisions and in the legislative history of the Act. • • • • *The Labor Management Relations Act sets up no general compensatory procedure except in such minor supple-*

mentary ways as the reinstatement of wrongfully discharged employees with back pay." (emphasis ours).

We hold that the State Court has jurisdiction of appellant's suit. Choate, et al. v. Grand International Brotherhood of Locomotive Engineers (S. Ct. of Texas, July 9, 1958); International Association of Machinists v. Gonzales, 78 S. Ct. 923; United Automobile Workers v. Russell, 78 [fol. 32] S. Ct. 932; Selles v. Local 174, International Brotherhood of Teamsters, etc., 314 P. 2d 456; Baun v. Lumber & Sawmill Workers Union, etc., 284 P. 2d 275. Appellant's second point on appeal is sustained.

The judgment of the trial court is reversed and the cause is remanded for trial on the merits.

Reversed and Remanded.

Dixon, Chief Justice.

Delivered July 25, 1958.

[fol. 33]

IN THE SUPREME COURT OF TEXAS

From Dallas County, Fifth District

No. A-7058

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, et al., petitioners,

v.

H. N. BORDEN, Respondent.

OPINION—November 4, 1959

On the principal question in this case, we hold that a member of an unincorporated association can maintain an action against the latter for damages caused by an intentional wrong knowingly committed by one of its agents, provided the association participates in or otherwise authorizes or ratifies the wrongful conduct. The suit is an

action for damages brought by H. N. Borden, respondent, against the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry and its Local Union 100, petitioners. Each petitioner is an unincorporated labor union. The trial court sustained petitioners' pleas in abatement and dismissed the suit on two grounds, holding: (1) that respondent, as a member of the two labor organizations, has no standing to maintain this suit against them for money damages; and (2) that the matters of which the respondent complains are within the exclusive jurisdiction of the National Labor Relations Board. Having concluded that neither of these contentions is sound, the Court of Civil Appeals reversed the judgment of the trial court and remanded the cause for trial. 316 S.W. 2d 458.

The holding of the Court of Civil Appeals that respondent's complaint does not lie within the exclusive jurisdiction of the National Labor Relations Board is not challenged here, and it is unnecessary for us to consider that question. We are confronted at the outset, however, by petitioners' contention that respondent did not perfect his appeal by timely filing an appeal bond. Within thirty days after the [fol. 34] entry of final judgment in the district court, respondent filed a bond conditioned that he would pay all costs that might be adjudged against him in the suit. It did not specify the judgment from which he wished to appeal, and was not conditioned that his appeal would be prosecuted with effect.

Petitioners moved the Court of Civil Appeals to dismiss the appeal, and respondent thereupon requested and was granted leave to amend the bond. A proper appeal bond was then filed promptly, but this was after the expiration of the thirty-day period allowed by Rule 356, T.R.C.P. Petitioners argue that the original bond was in no sense an appeal bond and therefore could not be amended. We do not agree. Rule 430, T.R.C.P., provides that when there is a defect of substance or form in any appeal bond, then on motion to dismiss for such defect, the appellate court may allow the same to be amended by filing a new bond. This authorizes the amendment of any sort of instrument which can be said to be a bond and which was filed for

the purpose of taking an appeal. See Grogan Mfg. Co. v. Lane, 140 Tex. 507, 169 S.W. 2d 141. Although the original bond does not show on its face that it was intended to serve as an appeal bond, there is other evidence in the record which supports an implied finding by the Court of Civil Appeals that the same was filed in a bona fide attempt to invoke appellate court jurisdiction. We presume such a finding in support of its action, and hold that the intermediate court did not err in permitting the bond to be amended.

Turning now to the merits of the appeal, respondent alleged that he is now a member of the two labor organizations. While a member of the United Association's local union in Galveston, he was promised a job by Farwell Construction Company on the construction of the Republic National Bank Building in Dallas. After obtaining a clearance card from the Galveston local stating that he was in good standing and should be admitted to any other local union of the United Association, he went to the headquarters of Local Union 100 in Dallas for the purpose of [fol. 35] being accepted into membership in order that he might take the job which had been promised him. In the meantime, Farwell Construction Company had placed a call with Cleo Lanham, agent and business manager of Local Union 100, for respondent to go to work on the bank building. Lanham at first refused to accept respondent's clearance card. Several days later, the card was accepted, but at the same time respondent was cursed and abused by Lanham and informed that as long as the latter had power, he would in his capacity as agent and business manager see to it that respondent was never allowed to work on the bank. Although respondent thereafter submitted his complaint to the petitioners at a meeting, he was offered no remedy and was told that if he continued to complain he would be discharged from the union altogether.

It was further alleged that the petitioners, with actual knowledge of the acts of their agent and business manager, had acquiesced in and ratified same by their subsequent conduct in that respondent was never offered a remedy or allowed to work on the bank building; that petitioners have, without any cause or reason whatsoever, wilfully and dis-

criminatorily refused to allow respondent to do such work: and that the wilful, malicious and discriminatory acts of the petitioners constitute a conspiracy and a wrongful interference with respondent's right to contract and work. There are also allegations of the amount which respondent would have earned on the bank job, and of his actual earnings in other employment he was able to find, and a prayer for actual and exemplary damages.

Petitioners contend and the trial court held that this case is governed by the general rule that an unincorporated association is not liable to one of its members for damages occasioned by the wrongful act of another member or agent of the association. The reason for such immunity is that the injured member and the association are regarded as co-principals and the tort-feasor as their common agent. The wrongful conduct is thus imputable to the plaintiff for [fol. 36] purposes of his action against the association. See Annotation, 14 A.L.R. 2d 473. Typical of the cases in which these principles have been correctly applied are De Villars v. Hessler, 363 Pa. 498, 70 A. 2d 333, 14 A.L.R. 2d 470, where the plaintiff was injured as a result of the negligent operation of a steam table maintained by the defendant association at a county fair, and Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587, which holds that an unincorporated labor organization is not liable for injuries received by a member who tripped over a platform negligently placed by the officers of the union in a hall rented for a union meeting. In each instance the negligence occurred in the course of an undertaking which was for the benefit of all members of the organization, including the plaintiff, and under these circumstances it was entirely proper to impute the wrongful conduct to the latter.

It cannot be said, however, that a labor organization or other unincorporated association is never liable to a member for the wrongful conduct of one of its agents. Since the association's immunity rests upon the premise that the tort-feasor also acts as agent for the injured member, the rights and liabilities of the parties necessarily depend upon the relationship existing at the time the wrongful act is committed. For example, where the relation of principal and agent is deemed to exist between the plaintiff and the

association's representative when the wrong was done, the former could not acquire a cause of action against the organization by simply terminating his membership. If anyone acting for the association is always to be regarded in law as agent for all of its members in whatever he may do, it would seem to follow that a member could not even recover damages for wrongful expulsion. In such a case the plaintiff might not be a member at the time of suit, but this would not alter the fact that the association's representative was acting as his agent in expelling him from membership.

It is well settled, however, that a member does have a cause of action for damages against his union for wrongful [fol. 37] expulsion. See International Printing Pressmen and Assistants' Union of North America v. Smith, 145 Tex. 399, 198 S.W. 2d 729; International Association of Machinists v. Gonzales, 356 U.S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018. The question now under consideration is not discussed in these cases, but the reasons for holding that the union representative does not act as agent for a member who is wrongfully expelled are well expressed in Bonsor v. Musicians' Union, (Eng.) 3 W.L.R. 788, 3 All E.R. 518, as follows:

> "For the purposes of this appeal I am prepared to accept that proposition (i.e. the general theory that the agent is the agent of each member of the association) without inquiry as to what, if any, are the limits to be put on it. *But one of its essential ingredients is that the act complained of should be done by the agent on behalf of the injured member.* Was the Court of Appeal right in holding that the committee which expelled Mr. Kelly was, in so doing, acting as his agent? . . . *To say that this is done on behalf of the person expelled seems to me to be an unwarranted extension of the agency and quite out of keeping with reality.*"

There is thus at least one exception to the general rule that a union representative is to be regarded as an agent for all of its members in everything he does. The wrong-

ful act will not be imputed to an injured member if committed in the course of an undertaking that is strictly adverse to the latter's interests. This is simply another version of the agency rule that a principal is not liable for the torts committed by his agent while acting adversely to him. See 3 C.J.S. Agency, § 259; Mechem on Agency, 2d ed. 1914, Vol. 2, p. 1311, § 1728.

The same idea is expressed in Taxicab Drivers' Local Union No. 889 v. Pittman (—— Okla. ——), 322 P. 2d 153, which is similar in some respects to the present case. There the plaintiff had signed a petition to the international union making certain accusations against the officers and business manager of the local union. The international union made an investigation but took no action against the officers of the local union. Charges were thereafter filed against the plaintiff alleging that he had violated the provisions of the union constitution making it an offense to abuse fellow [fol. 38] members. After a hearing which the court held was so unfair as to constitute no trial at all, the plaintiff was found guilty and sentenced to pay a fine and suspended from union activities for one year. Apparently he was not expelled from the union. On the next dues-paying date, the plaintiff tendered his dues but refused to pay the fine, and the union secretary declined to accept the dues unless the fine was also paid. Later the plaintiff was suspended from work by his employer at the request of the union pursuant to the provisions of a working agreement which required that all employees be in good standing with the local union. In the trial court the plaintiff was awarded recovery of actual and exemplary damages against both the local and the international union. The judgment against the latter was reversed on appeal because of defective service of process, but the recovery against the local union was upheld. In disposing of the contention that the union could not be subjected to liability for the acts of its agents because the plaintiff-member was equally responsible for the wrongful conduct, the court said:

> "We note, however, that in each of those cases [holding that a labor union or other unincorporated association is not liable to a member for damage caused by the association's agent] the conduct of the agent was

in the performance of his duty on behalf of the association in some project for which the plaintiff could reasonably expect to benefit just as much as any other member, at the inception of the project. . . . Common sense leads inexorably to the conclusion that officers of the Union causing plaintiff to be suspended from work without pay are anything but his agents for that purpose. The contrary conclusion would smack of flagellantism, an unlikely theory upon which to determine legal liabilities. The use of the agency doctrine under these specific circumstances has no support either in reason or public policy."

The contrary conclusion is not required by the decision in Brotherhood of Railroad Trainmen v. Allen, Tex. Civ. App., 230 S.W. 2d 325 (wr. ref.). In that case the union and the railroad had made a contract in settlement of claims for work which the latter had caused to be done by road crews instead of yard crews as required by the working agreement. By the terms of the settlement, the railroad was to pay a yard day to any available yard crew that would have been called to perform the work. Two members [fol. 39] of the union then checked the records and advised the railroad which employees were entitled to receive the money, and the funds were distributed among those so designated, about one-third being paid to extra men and two-thirds to regular men. Each of the plaintiffs was an extra man and was paid part of the award. They later brought suit against the railroad and the union, contending that they should have received practically all of the money that went to the regular men.

The plaintiffs there alleged that the actions of the railroad and the union were fraudulent in that they wilfully and knowingly contrived to benefit one group of employees at the expense of another group and that the collaboration of such defendants was a conspiracy against plaintiffs' rights, but the verdict does not support either of these theories. The railroad was dismissed prior to the trial, and no conspiracy issue was submitted. While the jury found, among other things, that the action of the union in designating others to receive the money was a fraud on the plain-

tiffs, the term "fraud" was defined as "any act, omission or concealment, which involves a breach of a legal duty, trust or confidence, justly imposed, and is injurious to another, or by which an undue and unconscientious advantage is taken of another . . . ." The element of wrongful motive or intent was not included in the definition, and the answer to Special Issue No. 12 was simply a finding of legal or constructive fraud.

The union representatives in the Allen case undoubtedly were acting for the plaintiffs' benefit in making the settlement and in checking the records to ascertain how the money should be distributed. As a result of these activities, the plaintiffs were designated to and did receive part of the funds. Any idea that the agents consciously worked against the plaintiffs' interests is effectively dispelled by the jury's determination that the distribution of the money was proximately caused by the negligent failure to check all available records. As the controversy reached the appel-[fol. 40] late court, therefore, it was simply a case of legal, but not wilful, fraud and discrimination resulting from negligence in performing services for the benefit of the plaintiffs and other union members. It was proper under these circumstances to impute the wrongful conduct to the plaintiffs and hold that they could not recover from the union for the dereliction of the joint agents.

The legal responsibility of an unincorporated association for the wrongful conduct of its agents should not be substantially different from that of an ordinary principal. The general rule is one principal is not civilly liable to another for the tortious acts of an agent who acts for both parties with their consent. He is responsible, however, where there is collusion with the agent, active participation in the wrongful act, or the same is otherwise authorized or ratified. See Ringer v. Wilkin, 32 Idaho 330, 183 P. 986; Boss v. Tomaras, 251 Mich. 469, 232 N.W. 229; Fuchs v. Leahy, 321 Mo. 47, 9 S.W. 2d 897; 3 C.J.S. Agency § 260. This was recognized in Blair v. Baird, Tex. Civ. App., 94 S.W. 116 (wr. dis.), where the court pointed out that "by the terms of the contract, O'Neal was the joint agent of the parties, and unless it had been shown that he had conspired with

appellant Blair to defraud appellees, appellants would not be responsible for any misconduct on the part of O'Neal."

The present controversy has not been tried on the merits, and we do not know what the evidence will disclose. According to the petition, it was Lanham's duty to place the members of the union with their various job opportunities. As long as he attempted in good faith to discharge that responsibility in a proper manner, his activities were calculated to benefit the respondent as much as any other member. If it appears that the denial to respondent of an opportunity to work on the Republic Bank Building, even though wrongful, resulted merely from negligence, inadvertence or mistake on the part of Lanham while trying to perform his duties fairly and impartially, petitioners are not legally responsible for respondent's damages. Brotherhood of Railroad Trainmen v. Allen, supra.

[fol. 41] Under the pleadings, however, respondent is not confined to proof of negligence, inadvertence or mistake. He alleges that upon his arrival in Dallas, Lanham at first refused to accept his card; that when the card was later accepted, he was cursed and abused by Lanham and informed that the latter would see to it that he was never allowed to work on the bank job; that he was threatened with expulsion from the union if he continued to complain of this treatment; and that the acts of the defendants were willful and malicious and constitute a conspiracy. These allegations will support proof that respondent was willfully denied a job opportunity to which Lanham knew he was entitled under the rules and procedures established by petitioners for allocating work among their members, and that petitioners either conspired with Lanham to bring this about or otherwise authorized or ratified his wrongful conduct. If these are the facts, we think the case represents another exception to the general rule mentioned above, and that respondent is entitled to maintain this suit against petitioners. It would be quite incongruous to say that the business manager was acting as agent for respondent in knowingly depriving him of all rights and privileges of union membership in so far as the Republic National Bank job is concerned.

We agree with the Court of Civil Appeals that the suit should not have been dismissed on the pleadings in their present form, and its judgment is affirmed.

Robert W. Hamilton, Associate Justice.

RWH/p

Concurring opinion by Associate Justice Smith.
Associate Justice Greenhill dissenting.

Opinion delivered:

November 4, 1959

[fol. 42]

CONCURRING OPINION

In concurring with the majority opinion, I feel constrained to set down my views relative to the improper action of the trial court in sustaining petitioners' plea in abatement and dismissing respondent's cause of action. The writ in the present case was granted because of the tentative view that the case of Brotherhood of Railroad Trainmen v. Allen, Tex. Civ. App., 230 S.W. 2d 325, wr. ref. cert. den. 340 U.S. 934, 71 S. Ct. 501, rehearing denied 341 U. S. 906, 71 S. Ct. 611, was controlling and required a dismissal of Borden's suit. I do not agree with petitioners that the Allen case is controlling. However, since the writ has been granted, and since the petitioners are entitled to a full analysis of the cases upon which they rely, as well as our reasons for declining to follow such cases, I respectfully file the following opinion.

The facts, as pleaded, show that the agent of the Union in perpetrating the alleged wrongful acts was not in fact [fol. 43] acting for Borden, although Borden alleged that he was and still was at the time of filing the suit a member of Labor Union 100. Borden alleged that on the 15th day of September 1953, he was promised a *job opportunity* on the construction of the Republic National Bank Building at Dallas, Dallas County, Texas, by Farwell Construction Company. Borden alleged that prior to such job offering, he was a member of labor union's local in Galveston, Texas; that he secured a clearance card from the Galveston union stating that he was in good standing and should be ad-

mitted to any other local union, but, that upon arrival in Dallas in September 1953, the Local Union 100, by and through its agent and business manager, Cleo Lanham, whose duty it was to accept Borden, refused to accept such clearance card; that Lanham so refused even though A. G. Thurman, a duly authorized representative of Farwell, had, by long distance telephone, given instructions that Borden had been employed and request was made that he be allowed to work; that on October 9, 1953 the labor unions finally accepted the clearance card, but at the same time Lanham, while acting in his official capacity, cursed and abused him, and thereafter did state and inform Borden "that as far as he, the said Lanham, had control and as long as he had any such power, he would in his capacity as Agent and Business Manager of the Union see to it that this plaintiff would never be allowed to work on the *job opportunity* promised to him by Farwell Construction Company." The petition further alleges in substance that the labor unions acquiesced in and ratified such conduct, and that all of such actions and conduct on the part of labor unions and said agent amounted to a conspiracy, and constituted an interference with Borden's right to contract and his inherent right to work. Borden also alleged that he had a contract with both labor unions, and implied in such contract was a promise by the labor unions not to discriminate unfairly or unjustly or to deny a member a right to work, and that the acts complained of constituted a breach of such implied contract. [fol. 44] Borden's prayer was for damages in the total sum of $19,039.50. The sums of $5,000.00 for mental anguish, $4,039.50 as damages for loss of earnings, and $10,000.00 as punitive damages make up the total.

Borden's pleadings indicate a total loss of earnings on the Republic Bank job would have been $7,097.00. However, in mitigation of his damages, he pleaded that "as a result of being denied the job opportunity on the Republic National Bank building, the plaintiff did attempt to find other work and did so find other wirk (sic) to-wit: Kiefer Plumbing Company, from which the plaintiff earned $1229.60; Rose Brothers Plumbing Company, from which the plaintiff earned $830.60; Spencer Brothers Plumbing Company, from which the plaintiff earned $997.30, but that the total

of the amount earned during this period was $4,039.50 less than he would have earned had he been allowed to work on the Republic National Bank Building in Dallas, Dallas County, Texas, during the same period, to-wit: September 15, 1953, to September 15, 1954."

The labor unions filed separate pleas in abatement. The trial court sustained both pleas. The parent body, United Association, limited its plea to the claim that Borden had no standing to sue it for the reason "that a member of an unincorporated Association may not sue said Association for *dereliction of duty upon the part of agents of such* Association, but rather the member must sue the agents as individuals."

Local Union 100 limited its plea in abatement to the contention that the matters of which "plaintiff complains" are matters within the exclusive jurisdiction of the National Labor Relations Board pursuant to the Federal Labor Management Relations Act of 1947 (Taft-Hartley), which statute provides in pertinent part that it is an unfair labor practice for a labor organization or its agents "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: PROVIDED, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisi-
[fol. 45] tion or retention of membership therein * * *; (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *." Labor union's pleading continues: "The cited Federal legislation preempts the field and deprives this Honorable Court of the State of Texas of jurisdiction to hear and determine the matters alleged in plaintiff's petition for the reason that exclusive jurisdiction of said matters are by federal statute, lodged in the federal administrative agency and the federal court, and plaintiff has wholly failed to seek, utilize, or exhaust remedies available before the federal agency and federal court under the federal law."

No evidence was introduced at the hearing on the pleas in abatement which began on November 30, 1956, and ended on February 15, 1957, when the trial court entered its judgment and order sustaining both pleas in abatement, reciting in the order "* * * and it appearing to the court that

plaintiff is a member of defendant labor organizations and thus has no standing to sue said organizations for money damages; and it further appearing that jurisdiction of a suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the exclusive jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, and accordingly this court is without jurisdiction."

On appeal, the Court of Civil Appeals reversed both holdings of the trial court, and remanded the cause for trial. 316 S.W. 2d 458.

The jurisdictional question, supra, is not before this Court. The two points presented here are: (1) that a member of a voluntary unincorporated union has no right to recover money damages from the association of which he is a member for the dereliction of duty of the joint agent of the association members; (2) that the Court of Civil Appeals lacked jurisdiction by reason of Borden's failure to perfect his appeal by timely filing an appeal bond.

I dispose of the questions in reverse order. The bond [fol. 46] filed within the 30-day period provided by Rule 356, Texas Rules of Civil Procedure, even though defective, conferred jurisdiction, and since the Court of Civil Appeals granted permission and Borden filed an amended bond, that court had jurisdiction of the appeal. See Rule 430, T.R.C.P.; Pillow v. McLean, 126 Tex. 349, 88 S.W. 2d 702 (1935); Williams v. Wiley, 96 Tex. 148, 71 S.W. 12 (1902); Grogan Manufacturing Company v. Lane, 140 Tex. 507, 169 S.W. 2d 141 (1943); Lusher v. First National Bank of Fort Worth, Tex. Civ. App., 260 S.W. 2d 621 (1953), er. ref. n.r.e.

This brings me to the first point. I have heretofore pointed out that the labor unions contend that the question is controlled by the rule announced in the case of Brotherhood of Railroad Trainmen v. Allen, supra.

In order to be certain as to the pleadings, facts, and issues involved in the Allen case, the Clerk of this Court secured from the Clerk of the Court of Civil Appeals at Waco, Texas, the original record in that case. The transcript reveals that the case originally began as a suit

against the Texas and New Orleans Railroad Company and the Brotherhood of Railroad Trainmen charging a conspiracy between the railroad and the Brotherhood, and further charging fraud. The pleadings in the alternative charged negligence in certain particulars on the part of the Brotherhood alone. At the close of the evidence, the railroad was dismissed from the case and the issue of fraud thereby went out of the case. Thereupon, 14 special issues were submitted to the jury. Thirteen of these issues were concerned with certain acts of alleged negligence and discrimination on the part of the Brotherhood. The Brotherhood was found guilty of several acts of negligence, and the jury found that each act was a proximate cause, etc. Special Issue No. 12 was conditionally submitted upon a "yes" answer to either Special Issue 1a or 1c. Those issues read as follows:

"Special Issue 1a: Do you find from a preponderance of the evidence that the Brotherhood of Railroad Trainmen, through its representative or representatives, designated persons other than available yard crews that would have been called to perform the work to receive payment under the awards involved herein?" Answer "Yes" or "No." Answer "Yes."

[fol. 47] "Special Issue No. 1c: Do you find from a preponderance of the evidence that the Brotherhood of Railroad Trainmen, through its representative or representatives, agreed to the designation of persons other than available yard crews that would have been called to perform the work to receive payment under the awards involved herein?" Answer "Yes" or "No." Answer "Yes."

Special Issue No. 12 reads:

"Do you find from a preponderance of the evidence that the Brotherhood of Railroad Trainmen, in so designating or agreeing to such designation, if you have so found (Special Issues 1a or 1c), practiced a fraud upon plaintiffs, or either of them?" Answer "Yes."

It is necessary to state the actual background, as reflected in the statement of facts in the record of the Allen case. After the dismissal of the issues of fraud, the Court was only concerned with the following pertinent facts bearing on negligence. Certain employees (yard men), of the railroad, who were also members of a Railroad Brotherhood, charged that the Brotherhood had negligently paid certain sums of money to the regular railroad crew in violation of the contract between plaintiff-employees and the Brotherhood. It was claimed that certain services within the Dallas yard, such as "picking up" cars, "setting out" cars, handling road engines, and turning engines and trains, under the contract between plaintiff-employees and the Brotherhood, were to be performed by the yard men and not the road crew. The plaintiff-employees alleged that the Brotherhood, a voluntary association, was, and had been for many years, the collective bargaining agent of the yard employees (plaintiffs), and under the terms of its membership contract with plaintiffs was obligated to represent them without discrimination in all disputes with the railroad. The plaintiffs' charge that the Brotherhood acted discriminatorily is found in the allegation that the Brotherhood, in distributing the funds involved, caused "some employees to get larger shares of the $60,616.20 than they were entitled to and caused plaintiffs to get far less than the amounts to which they were entitled and therefore the Brotherhood wrongfully deprived plaintiffs of the sums of which they were entitled." Plaintiffs sought judgment against the Brotherhood for all sums due under the contract dated March 1, 1946, between the Railroad and [fol. 48] the Brotherhood (acting for plaintiffs-yard men). The railroad was dismissed from the suit. The Court of Civil Appeals in its opinion in the Allen case states that A. L. Weiss and Doyle Andrews were the agents and representatives of plaintiffs as well as all other members of the Union; that Weiss selected Andrews to check the records; that Andrews did check the records; Weiss was present part of the time. After the check was made certain members were designated and certified to the railroad as being entitled to receive the funds; that the plaintiffs, as appellees, were contending that had all of the available

records been checked, it would have been ascertained that the extra men and not the road crew would have been entitled to receive most if not all of the money paid by the railroads under the awards.

Although the fraud issue was submitted, it is clear that when the case reached the Court of Civil Appeals for decision and when that court finally rendered its judgment, the dismissal of the railroad company from the suit effectively eliminated all issues of conspiracy and fraud and the Court of Civil Appeals decided only the narrow question relative to the charged acts of negligence on the part of the agents of the Brotherhood.

The Brotherhood's points, which were the only points considered and sustained in the Allen case were as follows:

"Point Ten

"Since the plaintiffs are members in good standing of the Brotherhood, which is a fraternal benefit association and labor union bargaining for the craft in the employment in which plaintiffs were engaged, plaintiffs cannot sue the Brotherhood for the acts of any Brotherhood agent, even though said acts were negligence, since the agents of the Brotherhood, being also members of the Brotherhood, are agents of the plaintiffs and each of them, and the Brotherhood is not liable to any member for the negligent acts of another member thereof."

"Point Eleven

"Each of the plaintiffs being a member in good standing of the Brotherhood, which is an unincorporated fraternal benefit association, as well as labor union, cannot sue the Brotherhood for the negligence of a brother member alleging that said member was a negligent agent of the Brotherhood, and since the agent is also the agent of the plaintiffs, even though the agent's act was negligent, if any one was liable to plaintiffs, it would be the agent and not the Brotherhood. Therefore the trial court erred in submitting issues of negligence of the Brotherhood to the jury

and in failing to sustain defendant's motions for instructed verdict and defendant's motion for judgment non obstante veredicto."

[fol. 49] This being the state of the record, the Court of Civil Appeals held, in effect, that the agents, Weiss and Andrews, were joint agents of plaintiffs and the Unions and all other members of the Union, and that under such circumstances, the plaintiffs had no cause of action against their coprincipals for the dereliction of common agents, citing Hromek v. Gemeinde (1941), 238 Wis. 204, 298 N.W. 587, and other cases. In the Hromek case, supra, it was held that no liability on the part of an unincorporated labor union existed in favor of a member who in a hall rented by the Union for purposes of its meeting, tripped over a platform negligently placed in the room by the officers of the Union and received injuries. The Court rested its decision on the ground that the officers of the Union were not only acting for the Union and all the other members but also for the plaintiff, and that plaintiff could not sue her coprincipals for the dereliction of a common agent. See 14 A.L.R. 2d 475.

In the case of Koogler et al. v. Koogler (1933), 127 Ohio St. 57, 186 N.E. 725, another case cited by the Court in the Allen case, the trustees of an unincorporated beneficial association were held not liable in damages to a member of the association for personal injuries sustained by him as a result of the falling of a fire-escape ladder on the sidewalk by the breaking of its suspending cable when he was walking on the sidewalk preliminary to replacing a glass on a broken window for the association. The ground of the decision was that since members of an unincorporated beneficial association are joint enterprisers, the tort of the association is the tort of all the members, including the plaintiff himself, and the plaintiff cannot sue himself for a tort committed by himself. The Court, however, in this latter case where the right of a member of an unincorporated association for injuries as the result of the negligence of the association was involved, distinguished such case from those cited by the plaintiff on the ground

that in some of the cited cases the defendant was a corporate entity, in others a contractual relation was involved, in others the party suing had not as yet become a member, in others action for expulsion was involved, and in still [fol. 50] others the party suing had ceased to be a member. In this case, as well as in the Allen case, the Court, in distinguishing the cases, recognized the right of a member of a voluntary association to be protected in the enjoyment of membership against any unauthorized act or proceeding on the part of his fellow members, either as individuals or in their official or collective capacity, by which his enjoyment of such right would be impaired or destroyed.

The application for writ of error in the Allen case was refused. The Brotherhood stated in its reply to the application for writ of error that "neither seniority rights, expulsion, nor the rights of members to work and earn a living are questioned in this case." The effect of this argument is to, in a measure, admit that if expulsion or the right to work and make a living had been involved, the plaintiffs' contention would have been correct. The Allen case stands for the proposition and its effect should be limited to instances where the union member bringing the action is equally responsible for the dereliction of the union representatives. The Allen case was fully developed and a complete trial of the issues was allowed, whereas, our Borden case went off on a plea in abatement. Borden has never had his day in court. The Brotherhood in the Allen case was in a position to discuss the constitution and bylaws of the association. Such instruments were introduced in evidence. Not so here. They were able to show that the members were seeking to invoke the rights of the Brotherhood to be free from destructive suits where no cause of action really existed.

The other Texas case relied upon by petitioners is that of Atkinson v. Thompson, Tex. Civ. App., 311 S.W. 2d 250 (1958), er. ref. n.r.e. July 9, 1958. The Court of Civil Appeals, in holding that the plea in abatement was properly sustained, cited the Allen case in support of such holding. The pleadings and the facts were different than those finally passed upon in the Allen case. Atkinson pleaded, in the

alternative, that the "Brotherhood actually instigated his discharge and said denial of his rights of seniority, and [fol. 51] conspired with Guy A. Thompson, Trustee, to deprive him of his rights of seniority, all to his damage in the amount of $7,000."

The railroad and the Brotherhood each filed a plea in abatement. The trial court sustained such pleas and the Court of Civil Appeals affirmed. The opinion of the Court of Civil Appeals contains language which may be interpreted as supporting the petitioners' position in the present case. The opinion, to the extent that it expresses holdings contrary to the holding by the majority and in this concurring opinion, should be expressly overruled. This should be done even though refusal of the writ, n.r.e. could be justified because of failure of the petitioners to properly preserve the point in this Court. Atkinson's pleadings of conspiracy and fraud, and the nature of the two pleas in abatement are set out in the opinion. The Court of Civil Appeals made its holding that "the real reason appellant cannot sue for the wrongful act of the agent of the Brotherhood is that as a member of the Brotherhood he is jointly responsible with all other members for the actions of the group itself, and accordingly as a principal he has no cause of action against coprincipals for the wrongful conduct of a common agent," in the light of Atkinson's pleadings. The court, in construing the Allen case, states that the railroad was dismissed, but it gives no effect to the fact that the dismissal also eliminated all issues as to wrongful participation in or ratification of the intentional wrong knowingly committed by one of the agents of the Brotherhood. For the reasons stated, I would not overrule the Allen case, but would overrule the Atkinson case.

The petitioners also rely upon the case of Marchitto v. Central Ry. Co. of N.J., 88 A. 851. It is clear from the opinion that in answering the question: "Did the complaint [fol. 52] state a cause of action against the defendants," the Supreme Court of New Jersey, speaking through Chief Justice Vanderbilt, confined its holding to the issues, as made by the pleadings, between the plaintiff on the one hand and the Brotherhood and its agent, Giles, on the other. The court held no cause of action had been stated against

the Brotherhood, but that as against Giles, the pleadings stated a cause of action. The cause of action against the railroad was ordered stricken by the trial court. Subsequent to this action, the trial court sustained the contention of the Brotherhood and Giles that the complaint (plaintiff's pleadings) failed to state a cause of action. It appears from the opinion that the court simply held that the Brotherhood was an unincorporated fraternal association; that it was not a separate legal entity and had no existence apart from that of its individual members; that in legal effect the plaintiff and every other member of the Brotherhood are co-principals joined together in a joint enterprise to accomplish a common purpose with their relationships to each other and to the group being governed by the Association's constitution and the bylaws or rules adopted pursuant thereto, and by the common law, and as a member of the group the plaintiff was jointly responsible with all other members for the actions of the group itself, and as a principal he had no cause of action against his co-principals for the wrongful conduct of their common agent. It cannot be successfully argued that the holding thus announced can be extended so as to control the decision in the present suit. The court apparently adopted the theory that the Brotherhood defendants were not in fact and in law the plaintiff's agents. The court said:

> "• • • It is universally recognized that an agent stands in a fiduciary relationship to his principal and is under a duty to be careful, skillful, diligent and loyal in the performance of his principal's business and that for a failure so to act he subjects himself to liability to his principal, 2 Am. Jur., Agency, §§ 251, 252, 274; 3 C.J.S., Agency, §§ 138, 155, 162, 172, 286; 2 Restatement, Agency, §§ 379, 387, 399. Since the complaint here charged these defendants with negligence, carelessness, fraud and breach of trust and made appropriate allegations of fact in support thereof, it necessarily follows [fol. 53] that a good cause of action was pleaded, if these defendants were in fact and in law his agents."

It does not appear that a conspiracy had been entered into between the railroad and Brotherhood, as alleged in

the present case, to deprive the plaintiff of the right to work or that the Brotherhood participated in a wrongful act against the plaintiff.

The case of Frederick Duplis v. Rutland Aerie No. 1001, Fraternal Order of Eagles, 118 Vt. 440, 111 A. 2d 727 (1955), relied upon by petitioners, was an action in tort to recover damages for injuries suffered by the plaintiff, a member of the defendant, Fraternal Order of Eagles. The injuries were sustained when the plaintiff tripped and fell on the stairway while leaving the defendant's premises. The court in upholding the action of the trial court in sustaining defendant's general demurrer to plaintiff's petition, held, in effect; that the plaintiff, having admitted in his pleadings and in oral argument that the defendant was an unincorporated association, and that at all material times the officers and agents were co-members with the plaintiff, that the trial court properly sustained the contention that the alleged acts of negligence of the agents were imputed to all members, including plaintiff, thereby precluding a recovery.

The facts as revealed by the pleadings in the present case bring it within the rule announced in cases where membership in a voluntary association has once been acquired, protection against expulsion or the deprivation of the right to work will be afforded by the courts. See Lundine v. McKinney, Tex. Civ. App., 183 S.W. 2d 265, no writ history; Dingwall v. Amalgamated Association, etc., 4 Calif. App. 565, 88 P. 597; 3 California Jurisprudence, 350, par. 5; Taxicab Drivers Local v. Pittman (Okla. S. Ct. 1957), 322 P. 2d 159, 41 LRRM 2045; Selles v. Local 174 of International Brotherhood of Teamsters, etc. (Washington S. Ct. 1957), 50 W. 2d 660, 314 P. 2d 456, 40 LRRM 2573.

Since no evidence was presented at the hearing on the [fol. 54] plea in abatement, the allegations contained in Borden's pleadings must be taken as true. The pleadings show that Borden was as effectively deprived of the right to work on the Republic National Bank job as if he had been expelled from membership. The fact that he worked on other jobs does not change the situation. The Constitution and Bylaws of the Association were not introduced in

evidence. However, we must assume, in the light of the pleadings, that Borden, in gaining membership, did not contract and agree to be bound by acts which would deprive him of the right to work. As was held in the Dingwall case, supra, " * * * Membership in a social or beneficial association is in itself a personal right, especially when the purposes of the association include the amelioration or improvement of the condition under which the members obtain their livelihood, and the holder of such right is entitled to be protected in its enjoyment against any unauthorized act or proceeding on the part of his fellow members, either as individuals or in their official or collective capacity, by which his enjoyment of such right will be impaired or destroyed."

It cannot be successfully said that the agents of the labor unions in depriving Borden of the right to work on the Republic National Bank job were acting as agents on behalf of Borden. On the other hand, it should be noted that in the Allen case, supra, the agent was acting in the performance of his duty on behalf of the plaintiffs in such manner that the plaintiffs could reasonably expect to benefit just as much as any other member. At the inception of the controversy, the matter in dispute was left to the agent. That agent was acting in behalf of the plaintiffs. Here we have, as pointed out above, quite a different situation. One of the "essential ingredients is that the act complained of should be done by the agent on behalf of the complaining member." See Bonson v. Musicians' Union (1955 House of Lords), 3 W.L.R. 788, 3 All E.R. 518; Taxicab Drivers Local v. Pittman, supra.

The agents of the union in the present case were not Borden's agents for the purpose of denying him the right to work on the Republic National Bank job. In the Pittman case, supra, the Court said: "Common sense leads inexorably to the conclusion that officers of the Union [fol. 55] causing plaintiff to be suspended from work without pay are anything but his agent for that purpose. The contrary conclusion would smack of flagellantism, an unlikely theory upon which to determine legal liabilities. The use of the agency doctrine under these specific circum-

stances has no support either in reason or public policy." The reasoning in the Pittman case applies with equal force here.

This case has not been decided on its merits. The majority recognizes this fact, but proceeds to instruct the trial court how it should rule in the event it should appear that the denial to respondent of an opportunity to work on the Republic Bank Building, even though wrongful, resulted merely from negligence, etcetera. It is sufficient for this Court to confine its opinion to the questions presented as the result of the error of the trial court in sustaining the plea in abatement.

The respondent is entitled to a trial, and it will be for the trial court to direct that trial. I join in affirming the judgment of the Court of Civil Appeals.

Clyde E. Smith, Associate Justice.

CES:os
Nov. 4, 1959

[fol. 56]

DISSENTING OPINION

I respectfully dissent. This is not a suit against the business agent who mistreated Borden. In my opinion, the legal principles here involved as to the Union are controlled by *Brotherhood of Railway Trainmen* v. *Allen* (1950), 230 S.W.2d 325, writ refused, and *Atkinson* v. *Thompson* (1958), 311 S.W.2d 250, writ refused N.R.E., which follows the *Allen* case.

Joe Greenhill, Associate Justice.

Opinion delivered
November 4, 1959

[fol. 57]

IN THE 116TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

No. 2803

H. N. BORDEN

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

and

LOCAL UNION 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

FIRST AMENDED ANSWER OF DEFENDANT, LOCAL UNION #100 —Filed July 6, 1960

Comes Now Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (hereinafter called "Local Union") and files this its First Amended Answer to the first amended original petition filed herein by H. N. Borden, and would respectfully show:

1.

Defendant excepts to paragraph III of the amended petition wherein it is alleged that Heath and Thurman were each authorized to agree for the reason that this is a conclusion, does not advise defendant who authorized Heath and Thurman, or the nature and scope of the authorization, and the pleading of the general conclusion that Heath and Thurman were authorized leaves this defendant without [fol. 58] knowledge of what plaintiff expects to prove and without the opportunity of properly preparing its defense herein, and of this exception this defendant prays judgment of the Court.

2.

Defendant excepts to paragraphs V and VII of the amended petition herein for the reason that, (1) it is immaterial with what purpose plaintiff went to the union office; and (2) it is nowhere alleged that plaintiff actually presented his clearance card to anyone, nor is it alleged to whom such card was presented, when such card was presented, nor the circumstances of such presentation, and of this exception this defendant prays judgment of the Court.

3.

Defendant excepts to the amended petition herein at paragraph VIII wherein it is alleged only that plaintiff was cursed and abused and threatened by Lanham, but it is nowhere alleged that Lanham or anyone else actually prevented plaintiff from going to work, or denied plaintiff employment, and for all that appears in plaintiff's pleading he could have proceeded to work for Farwell at the Republic Bank job had he wished to do so; and it is nowhere alleged what agent of defendant prevented plaintiff from obtaining such employment, or otherwise denied employment to plaintiff, nor are the circumstances of denial of employment alleged, and of this exception defendant prays judgment of the Court.

4.

Defendant excepts to the allegation at paragraph IX of the amended petition wherein it is alleged as a conclusion that defendants have continued to refuse to allow plaintiff to work on the Republic Bank Building for the reason that [fol. 59] this is a conclusion of the pleader and no facts are alleged in support of said conclusion, nor is there specification as to what agent of defendant refused to allow plaintiff to work or the circumstances of such alleged refusal, and of this exception defendant prays judgment.

5.

Defendant excepts to paragraph IX of the amended petition for the reason that nowhere therein is it alleged that

any officer, agent or other person empowered to bind this defendant, or for whose actions this defendant is legally responsible in anywise refused to allow the plaintiff to go to work on the Republic Bank Building or any place else.

6.

Defendant excepts to the allegations of paragraph X of the amended petition herein, for the reason that it is a pure conclusion of the pleader and does not allege any facts, and a mere allegation of wilful, malicious and discriminatory acts of the defendant fails to specify what acts were wilful, malicious and discriminatory, by whom said acts were alleged to have been performed and when and where said acts were alleged to have been performed and fails to identify which acts interfered with plaintiff's rights, and of this exception this defendant prays judgment of the Court.

7.

Defendant excepts to paragraph XI of the amended petition herein for the reason that it is nowhere specified what officers or agents or employees of the defendant engaged in any wilful and malicious acts or any conspiracy, nor is there [fol. 60] any specification of what acts constitute wilful and malicious acts, or constitute a conspiracy, or when said acts were alleged to have taken place, or where said acts were alleged to have taken place, and said allegation in paragraph XI with respect to this defendant constitutes merely a conclusion of law, and of this exception this defendant prays judgment of the Court.

8.

Defendant further excepts to the allegations of paragraph XI for the reason that it alleges only that defendants propose to violate plaintiff's alleged rights, and of this exception defendant prays judgment of the Court.

9.

Defendant excepts to paragraph XII of the amended petition herein for the reason that it is a mere conclusion of the

pleader; it does not specify what acts are alleged to constitute a monopoly or restraint of free pursuit of lawful trade, by whom said acts were alleged to have been committed, when said acts were alleged to have been committed, or that said acts were committed by any person authorized to commit said acts by this defendant, or that said acts were ratified by this defendant, and of this exception this defendant prays judgment of the Court.

10.

Defendant excepts to paragraph XIII of the amended petition for the reason that there is no specification as to what persons are alleged to have represented this defendant at the meeting referred to in paragraph XIII, nor is there any allegation that such persons are authorized or empowered to act on behalf of this defendant; nor is there any allega- [fol. 61] tion as to who made threats, or as to the nature of the alleged threat made, or that the person allegedly making such threat was authorized to act on behalf of or otherwise legally empowered to bind this defendant, nor is the time and place of the alleged meeting specified, and of this exception defendant prays judgment of the Court.

11.

Defendant excepts to paragraph XIV of the amended petition herein for the reason that it is a pure conclusion of the pleader and alleges no facts, and of this exception defendant prays judgment of the Court.

12.

Defendant excepts to paragraph XV of the amended petition herein for the reason that it is nowhere specified what acts of defendant or of its agents (none of which are specified) are alleged to have breached the alleged implied promise in the contract, nor is said contract specified or identified as to when entered, by whom and what is provided therein; and nowhere is this defendant advised as to how it allegedly breached the implied promise in the contract or by what agent or agency it allegedly breached said implied promise, or when said implied promise was alleged

to have been breached, and of this exception defendant prays judgment of the Court.

13.

Defendant denies each and every allegation in the amended petition and demands strict proof thereof.

14.

Pleading further defendant would show that the officers and members of Defendant Local 100 had no knowledge of [fol. 62] plaintiff's claim until after plaintiff engaged an attorney, almost a year after the events of which he now complains. Plaintiff made no complaint to the union or its officers or members about the matters about which he now complains, instead he accepted membership in the local union, received benefits therefrom in referrals by the union business manager to jobs at union rates of wages with Keifer Plumbing Company, Rose Pluinbing Company, Spencer Plumbing Company, and others. Plaintiff enjoyed this employment at union rates of pay and at fair working conditions established and protected by defendant union, and made no protest or indication to union or its members that he was in *anyway* dissatisfied.

Had plaintiff timely indicated his dissatisfaction with Lanham's actions or inactions, by filing charges under the Union Constitution, a remedy would have been available within the union whereby the membership could have instructed Lanham to take such action as was appropriate —including referring plaintiff to such position as the facts warranted. But by his failure to utilize such remedy plaintiff made it impossible for defendant union to correct the wrong, if any.

Actually, the union and its officers and members had no knowledge of plaintiff's claim of Lanham's alleged dereliction until almost a year later—by which time it was too late to obtain the employment which plaintiff sought.

Plaintiff's failure to apprise defendant of Lanham's alleged derelictions amounts to inexcusable neglect and laches barring plaintiff's recovery.

[fol. 63]

15.

Plaintiff's continued acceptance of benefits of union membership without complaint, and without giving the union an opportunity to correct any situation which needed correction, constituted plaintiff's apparent acquiescence in Lanham's actions. Union relied on such acquiescence. Plaintiff is therefore estopped from recovery herein.

16.

Plaintiff is required by the Union Constitution to exhaust available remedies within the union. This he failed to do. Accordingly, he has breached his contract with his union brothers, and cannot obtain monies from his union when he, himself, has failed to live up to his contract.

17.

Pleading further defendant would show that at no time during the period which plaintiff claims he was damaged were all the members of defendant Local Union employed, and that as a matter of fact there were substantial periods of unemployment for substantial numbers of the members of the local union; and that this union owes no duty to plaintiff in these circumstances to prefer plaintiff for employment over other members of the local union, and that plaintiff by his claim here is seeking to obtain privilege or preferment over and above his brothers in the union, many of whom had been out of employment longer than he, and that this defendant union owes no duty of such privileged or preferential treatment to plaintiff.

18.

Pleading further defendant would show that plaintiff Borden presented himself to Business Manager Lanham in [fol. 64] an intoxicated condition, and at a time when no calls for workers had been received from authorized agents of Farwell Construction Company at the Republic Bank job, and in these circumstances Lanham owed no duty to plaintiff Borden. Insofar as defendant is advised, Lanham attempted in good faith to discharge his duties in a proper

manner, and his activities were calculated to benefit the plaintiff as much as any other member.

19.

Pleading further defendant would show that in referring members to employment Lanham was engaged in an undertaking which was for the benefit of all members of the organization, including plaintiff, and any wrongful conduct in which Lanham may have engaged in such undertaking is therefore imputed to the plaintiff immunizing defendant under the general rule that an unincorporated association is not liable to one of its members for damages occasioned by the wrongful act of an agent of the association.

20.

Pleading further defendant local union would show that it had no knowledge of Lanham's alleged wrongful actions toward plaintiff, and having no knowledge thereof it could not, and did not, act in collusion with Lanham, or actively participate in Lanham's act or otherwise authorize or ratify Lanham's act.

21.

Pleading further, defendant would show that the construction of the Republic Bank Building affected interstate commerce, and that union's activities in connection therewith affected interstate commerce; that by the federal Labor Management Relations Act of 1947, as amended (Taft-[fol. 65] Hartley), the Federal Congress has pre-empted to Federal tribunals the jurisdiction of the matters alleged in plaintiff's amended petition to the exclusion of the jurisdiction of the courts of the State of Texas.

22.

Pleading further, defendant says that if it be mistaken in the matters set out in paragraph 18 above, and if plaintiff was in fact deprived of any rights by Lanham, such was the result of negligence, inadvertence or mistake on the part of Lanham, while trying to perform his duties fairly and

impartially, and defendants are thus not legally responsible for plaintiff's damages.

WHEREFORE, having fully answered herein, defendant Local Union 100 prays that plaintiff take nothing by his suit, and that this defendant be discharged with its costs, and for such other relief as to which this defendant may be entitled.

Mullinax, Wells, Morris & Mauzy, By L. N. D. Wells, Jr., 1601 Nat. Bankers Life Bldg., Dallas 1, Texas, Attorneys for Local Union 100.

[fol. 66]

IN THE 101ST JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

No. 2803

H. N. BORDEN

VS.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

and

LOCAL UNION 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

ORDER OVERRULING EXCEPTIONS—July 18, 1960

Be It Remembered that on this 18th day of July, 1960, prior to announcement on the call of this case, defendants Local 100 and United Association, and each of them, timely presented to the Judge Presiding in this court their exceptions contained in the First Amended Answer of Defendant Local Union No. 100 in paragraphs numbered one through twelve inclusive, and in the First Amended Answer

of Defendant United Association in paragraphs one through three inclusive, and each of said exceptions were considered and overruled by the court, to which action of the court defendants, and each of them, excepted, and at said time defendants also presented Defendant's Motion for Summary Judgment which was by the court taken under advisement and carried along with the trial of the case. *Judgment entered now for judgment rendered on July 18, 1960.*
[fol. 67]

A. R. Stout, Judge Presiding.

Judge 40th Judicial District Court Sitting for Judge 101st Judicial District Court of Dallas County, Texas.

[fol. 68]

IN THE 101ST JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

No. 2803

H. N. BORDEN

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

and

LOCAL UNION 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

TRIAL AMENDMENT OF PLAINTIFF—Filed July 21, 1960

To the Honorable Judge of Said Court:

Now Comes the Plaintiff in the above styled and numbered cause and requests leave of the Court to file this his First Trial Amendment to and as a part of his First Amended Petition in this cause in connection with and as

a substitution for certain paragraphs of said First Amended Petition, and for same would show the Court as follows:

I.

That the following be substituted as and for paragraphs V and VI of Plaintiff's First Amended Petition.

That the Plaintiff came to Dallas in or about September, 1953. That upon his arrival in Dallas he went to Local Union 100 of the United Association with the purpose of being accepted in order that he might then go to work on the job opportunity promised to him by Farwell Construction Company; that Plaintiff, on or about the 15th day of September, 1953, presented his Dues Book in the United Association to the said Cleo Lanham, Agent and Business [fol. 69] Manager for Local Union 100, stating that he desired to work in Dallas, Texas, and be referred out by said Local Union 100, and was entitled to place said Dues Book in said Local Union and become a member thereof, but that at that time Plaintiff was informed by said Cleo Lanham that the Local Union would not refer Plaintiff to the Republic National bank job, even though such job opportunity was open and available to Plaintiff through a call which had been placed for him, and said Cleo Lanham refused to accept Plaintiff's Dues Book and refer him out to work, or to make any effort on Plaintiff's behalf whatsoever.

Thereafter, Plaintiff returned to Shreveport, Louisiana, to the Local Union of the United Association, the Local Union in which Plaintiff had his membership at that time, and obtained his Clearance Card from such Local Union stating that he was in good standing and should be admitted to any Local Union of the United Association. Upon Plaintiff, Borden's arrival in Dallas, Local Union 100, by and through its then Agent and Business Manager, Cleo Lanham, whose duty it was to accept Plaintiff, refused to accept such Clearance Card, and that at that time, or shortly thereafter, a call was placed to said Local Union of the United Association for Plaintiff to work on the Republic National Bank building project for Farwell Construction Company, such call being placed by the above

named A. G. Thurman, and said call calling for Plaintiff to go to work on said project.

II.

That the following paragraph be added to Plaintiff's First Amended Petition as Paragraph IX(a).

That Plaintiff had no further recourse through Defen- [fol. 70] dants; and that in fact no remedy is provided in the Constitution and By-Laws of either Defendant for the wrongful acts of which Plaintiff complains; and further that such remedies as set forth in the Constitution and By-Laws of Defendants do not and cannot rectify the wrongs against Plaintiff and pursuit of any remedy through Defendants would be futile, illusory or vain and amount to a practical denial of justice; and further, pursuit of any remedy of any nature was effectively denied and would be futile because of the aforesaid threats against Plaintiff and Plaintiff's person; and that Plaintiff's only effective remedy is in this Civil Court.

Wherefore, Premises Considered, Plaintiff prays that the Court allow this Trial Amendment to Plaintiff's First Amended Original Petition; and further, Plaintiff prays as he has heretofore prayed.

Lyne, Blanchette, Smith & Shelton, By Robert W. Smith, Attorneys for Plaintiff, 1100 Adolphus Tower, Dallas, Texas, Phone: RI 1-4871.

[fol. 71]

IN THE 101ST JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

No. 2803

H. N. BORDEN

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

and

LOCAL UNION 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

JUDGMENT—Entered October 3, 1960

On this the 18th day of July, 1960, the above entitled and numbered cause coming on for trial in its regular order, came the parties and announced ready for trial, and, a lawful jury being duly called, selected and sworn for the trial of said cause, the pleadings and evidence were heard by the Court and the jury, and at the conclusion of the evidence, the Defendant filed its motion for directed verdict, and, the Court being of the opinion that Judgment should be entered, as a matter of law, for the Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, the Court gave the jury a peremptory instruction to return a verdict for the Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and such verdict being rendered in obedience to the instruction, it [fol. 72] is therefore ordered, adjudged and decreed that Plaintiff take nothing by his suit against Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Can-

ada and that said Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada recover of Plaintiff its costs in this behalf expended and go hence without day, to which action of the Court the Plaintiff then and there in open court excepted and gave Notice of Appeal to the Court of Civil Appeals for the 5th Supreme Judicial District sitting at Dallas, Texas; and the Court being of the opinion that the motion for directed verdict on behalf of Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada should be in all things overruled, the Court did thereupon overrule such Motion of Defendant Local 100 and submit the case to the jury upon Special Issues, and the jury, on their oath, do, for their verdict, and in response to the following Special Issues, Definitions and explanatory instructions submitted to them by the Court on July 21, 1960, make the following respective findings:

This case is submitted to you upon Special Issues in the form of questions. In arriving at your answers to these Special Issues, there are standards of conduct to be followed, and rules of propriety to be obeyed, which, if disregarded, could make a nullity of these proceedings, and all our efforts could be wasted:

1. You will not be concerned with the effect of your answers, nor the judgment that the Court may render after [fol. 73] considering your answers. Neither should you speculate upon who might win or lose the case by such answers.

2. Your answers should be determined without bias, prejudice, sympathy, resentment or any other emotion, except to honestly reflect your findings to the question asked.

3. It is always improper to speculate about, consider, discuss or even mention costs of litigation, attorney's fees, or any other similar matter not shown by the evidence.

4. You should not mention—nor testify to—any personal knowledge, or information you may have about any fact or person connected with this case, which is not shown by the evidence.

5. When words used in the issues are not used in their ordinary meaning, or have a particular meaning, a proper definition of such words will be submitted to you. You will accordingly receive the law of this case only from the Court as given you in this charge and be governed thereby.

6. You are the exclusive judges of the facts proved, the truthfulness and credibility of the witnesses, and the weight to be given their testimony.

7. By the term "wilfully", as used in this charge, is meant the intentional and purposeful disregard of the known rights of another.

The questions asked are usually begun with the phrase, "Do you find from a preponderance of the evidence" that a certain event, act, omission or transaction took place. A "preponderance of the evidence" is defined in the law as the greater weight and degree of credible testimony.

By the term "mental anguish" as used in this charge, [fol. 74] is meant the intense pain of body or mind and a high degree of mental suffering and not mere disappointment or regret. The emotion of anger is not classed as mental suffering.

By the term "authorized" as used in this charge is meant that which is done by one in the interest of another by his authority or with his consent.

By the term "detriment" as used in this charge is meant any loss or harm suffered in person or property.

Special Issue No. 1:

Do you find from a preponderance of the evidence that on or about September 15, 1953, the Plaintiff H. N. Borden was promised a job on the construction of the Republic Bank Building in Dallas, Texas, by the authorized foreman, if any, of the Farwell Construction Company?

Answer "Yes" or "No"

Answer: Yes

Special Issue No. 2:

Do you find from a preponderance of the evidence that at a time when the Plaintiff was available for work, if he was, a call was placed by A. G. Thurman calling for Plain-

tiff to go to work upon the Republic National Bank Building?

Answer "Yes" or "No"

Answer: Yes

If you have answered the above Special Issue No. 2 "Yes", and in that event only, then answer Special Issue No. 3.

Special Issue No. 3:

Do you find from a preponderance of the evidence that the Defendant Local Union 100 by and through its business manager, Cleo Lanham, thereafter refused to accept the Plaintiff's clearance card from his local union in Shreveport, Louisiana?

[fol. 75] Answer "Yes" or "No"

Answer: No.

If you have answered the above Special Issue No. 3 "Yes" and in that event only, then answer Special Issue No. 4.

Special Issue No. 4:

Do you find from a preponderance of the evidence that in refusing such clearance card of Plaintiff, (if you have so found), that the said Cleo Lanham did in his capacity as Business Manager of Defendant Local Union 100 act wilfully, as that term is herein defined?

Answer "Yes" or "No"

Answer .....

(Not Answered)

Special Issue No. 5:

Do you find from a preponderance of the evidence that the said Defendant Local Union 100, acting by and through Cleo Lanham, wilfully refused to let the Plaintiff work on said Republic National Bank Building?

Answer "Yes" or "No"

Answer: Yes

If you have answered the above Special Issue No. 5 "Yes", and in that event only, then answer Special Issues Nos. 6 and 7.

Special Issue No. 6:

Do you find from a preponderance of the evidence that such refusal, if any, was made at a time when said Cleo Lanham knew, if he did, that under the rules of said Local Union, if any, the Plaintiff was entitled to work on said Bank Building?

Answer "Yes" or "No"

Answer: Yes

Special Issue No. 7:

Do you find from a preponderance of the evidence that [fol. 76] such refusal to let the Plaintiff work on said Republic National Bank Building, if you have so found, was without any cause or reason whatsoever?

Answer "Yes" or "No"

Answer: No.

Special Issue No. 8:

Do you find from a preponderance of the evidence that with full knowledge of the conduct of Cleo Lanham, if any, concerning Plaintiff, the officers and members of the said defendant Local Union 100 approved such conduct?

Answer "Yes" or "No"

Answer: Yes

Special Issue No. 9:

What sum of money, if any, do you find from a preponderance of the evidence that the Plaintiff would have earned if he had been allowed to work on the Republic National Bank Building during the time from September 15, 1953 to September 15, 1954?

Answer as to the amount in dollars and cents, if any; otherwise, let your answer be "None".

Answer: $5,856.00

Special Issue No. 10:

What sum of money do you find from a preponderance of the evidence that the Plaintiff did earn, or by the use of reasonable diligence could have earned, during the same period of time from September 15, 1953 to September 15, 1954?

Answer as to the amount in dollars and cents.
Answer: $3,940.00

Special Issue No. 11:

Do you find from a preponderance of the evidence that the Plaintiff, by being denied the job opportunity on the [fol. 77] Republic National Bank project by Defendant, Local Union 100, if you have so found that he was denied such job opportunity, suffered any mental anguish?
Answer "Yes" or "No"
Answer: Yes

If you have answered Special Issue No. 11 "Yes", and only in that event, you will answer the following Special Issue; otherwise you need not answer same.

Special Issue No. 12:

Do you find from a preponderance of the evidence that said Defendant's denial of the job opportunity to Plaintiff in the Republic National Bank project, if you have so found that Defendant did deny Plaintiff such job opportunity, was a proximate cause of Plaintiff's suffering mental anguish, if any?
Answer "Yes" or "No"
Answer: Yes

In connection with the above Special Issue No. 12, you are instructed that by the term "Proximate Cause" is meant that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produces an event, and without which the event would not have occurred; and to be a proximate cause of an event it should be such as that it could have been reasonably anticipated and foreseen by a person of ordinary prudence in the exercise of ordinary care that the event, or some similar event, would have resulted from such cause as a natural and probable consequence, in the light of the attending circumstances.

If you have answered the above Special Issue No. 12 "Yes", and in that event only, then answer Special Issue No. 13.

[fol. 78] Special Issue No. 13:

What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate the Plaintiff for the mental anguish, if any, suffered by him by virtue of being denied the right to work on the Republic National Bank project by Defendant Local Union 100, if you have so found that he was denied such job opportunity?

Answer as to the amount, if any, in dollars and cents; otherwise let your answer be "None".

Answer: $1,500.

Special Issue No. 14:

From a preponderance of the evidence, what sum of money, if any, do you award the Plaintiff against the Defendant Local Union 100 as punitive damages, if any?

Answer as to the amount, if any, in dollars and cents; otherwise let your answer be "None".

Answer: $5,000.00

In connection with the above Special Issue No. 14, you are instructed that by the term "punitive damages" is meant damages which are assessed against the Defendant for the purpose of punishing it and also for the purpose of setting a wholesome example, if any, to others.

Special Issue No. 15:

Do you find from a preponderance of the evidence that after having been refused the opportunity to work on said Republic National Bank Building, if he was, the Plaintiff failed to pursue his grievance, if any, within the rules and procedures of said Local Union 100 that were available to him, if any were available?

Answer "He did fail" or "He did not fail"

Answer: He did fail.

Special Issue No. 16:

[fol. 79] Do you find from a preponderance of the evidence that in October, 1953, the Plaintiff voluntarily accepted work upon referral from Defendant without any complaint?

Answer "Yes" or "No"
Answer: Yes

If you have answered Special Issue No. 16 "Yes" and in that event only, then answer Special Issue No. 17.

Special Issue No. 17:

Do you find from a preponderance of the evidence that the Plaintiff acquiesced in Defendant Local Union 100's actions?

Answer "Yes" or "No"
Answer: No

By the term "Acquiesce" as used in the foregoing issue, you are instructed that it means a voluntary acceptance or consent by remaining silent or omitting to object. If you have answered the above and foregoing Special Issue No. 17 "Yes" and in that event only, then answer Special Issue No. 18.

Special Issue No. 18:

Do you find from a preponderance of the evidence that the said Defendant relied upon the Plaintiff's acquiescence, if any, to its detriment?

Answer "Yes" or "No"
Answer: .....
(Not Answered)

Special Issue No. 19:

Do you find from a preponderance of the evidence that the Plaintiff failed to apprise the Defendant Local Union 100 of his complaints?

Answer "Yes" or "No"
Answer: No

[fol. 80] If you have answered the above Special Issue No. 19 "Yes" then in that event only, answer Special Issue No. 20.

Special Issue No. 20:

Do you find from a preponderance of the evidence that such failure, if you have so found, amounted to inexcusable neglect?

Answer "Yes" or "No"
Answer: .....
(Not Answered)

In connection with the above and foregoing Special Issue No. 20, you are instructed that by the term "inexcusable neglect" is meant such delay as a reasonably prudent person would in no event have exercised under the same or similar circumstances. If you have answered the foregoing Special Issue No. 20 "Yes" and in that event only, then answer Special Issue No. 21.

Special Issue No. 21:

Do you find from a preponderance of the evidence that such inexcusable neglect, if any, worked a disadvantage to the Defendant, Local Union 100?
Answer "Yes" or "No"
Answer: .....
(Not Answered)

Special Issue No. 22:

Do you find from a preponderance of the evidence that it would have been useless for Plaintiff to have pursued his complaint, if any, within the rules and procedures, if any, of said Defendant Local Union 100?
Answer "Yes" or "No"
Answer: Yes

After you retire to your jury room, you should select one of your members as your "Foreman". It is his duty:

[fol. 81] 1. To preside during your deliberations,

2. To see that your deliberations are conducted with propriety,

3. Communicate with the Court *In Writing* on any matter requiring further instruction or assistance,

4. Vote with you upon each issue,

5. Write your answers to the issues in the spaces provided; and

6. To certify to your verdict in the certificate attached to this page.

Your answers must be by unanimous vote. In voting upon your answers, you may do so orally, in writing, by show of the hands, or in any other fair manner convenient to you; but you must not reach a verdict by lot, chance nor trading upon your answers.

After you have retired to consider your verdict, no one has any authority to communicate with you except the officer who has you in charge, and he can only inquire if you have agreed upon a verdict.

When you have answered all of the foregoing questions as requested, and your Foreman has placed your answers in the spaces provided, you will advise the officer in charge at the door of the jury room that you have reached a verdict, whereupon you will return into court with your verdict.

A. R. Stout, Judge Presiding, Judge of 40th Judicial District, Sitting for Judge of 101st Judicial District.

We, the Jury, Have Answered the Above and Foregoing Special Issues as Herein Indicated, and Herewith Return Them Into Court as Our Verdict.

[fol. 82] Clare G. Weakley, Jr., Foreman.

(And the following communication and answer of the Court)

I have received your communication reading as follows:

"Issue #7

Does 'without any cause or reason' mean without any reason whatsoever (personal or otherwise) or does it mean without reason according to the union by laws?

Clare G. Weakley, Jr., Foreman"

in answer to such communication, you are instructed that:

It means a cause or reason which was actuated by an intent that was not in good faith. A denial, even though erroneous, which resulted merely from negligence, inadvertence or mistake would not be without any cause or reason whatsoever.

A. R. Stout, Judge Presiding.

Which findings were received by the Court and were filed and entered of record on the Minutes of such Court.

And the Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada having filed its Motion for Summary Judgment and having presented the same to the Court prior to the commencement of the trial of this cause, and the Court having carried the said Motion along until such time as all of the evidence was adduced by both Plaintiff and Defendant, and the Court being of the opinion that the said Motion should [fol. 83] be in all things overruled, said Motion of Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada is hereby in all things overruled.

Whereupon Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada filed its Motion for Judgment on the Verdict of the Jury, and in the alternative for Judgment non obstante veredicto, and Plaintiff made his Motion for the Court to disregard certain Special Issue jury findings and for Judgment based upon the remainder of the verdict of the jury and, after reasonable notice thereof, all parties appeared by their respective attorneys. The Court having heard and considered said Motions and being of the opinion that the Motion of Plaintiff should be granted (except as herein limited) and that the Motions of Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada should be overruled;

It Is Accordingly Ordered, Adjudged and Decreed that the Motions by Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada be and the same are in all things overruled, and the Motion filed by Plaintiff to disregard certain Special Issue Jury findings (being particularly Special Issue No. 7,

which is not a controlling issue) and to enter judgment on the remainder of the jury verdict is hereby granted as hereinafter limited and stated:

And the Court having considered the verdict, and being [fol. 84] of the opinion that Plaintiff is not entitled to recover any sum for mental anguish in a suit of this type and that such issue was not raised by the law and the evidence and should not have been submitted, and being further of the opinion that the punitive damages found by the jury are unjust and excessive under the facts and that the plaintiff should be required to remit to the extent that such punitive damages not exceed the actual damages awarded, to which said Plaintiff has agreed and does remit and assent subject to its right to complain in the event of an appeal by the said defendant, the court is therefore of the opinion that judgment should be rendered for the Plantiff as follows:

It Is Therefore, Ordered, Adjudged and Decreed that Plaintiff H. N. Borden do have and recover of and from Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada the sum of Three Thousand Eight Hundred Thirty-two Dollars ($3,832.00), together with interest thereon at the rate of Six (6) per cent per annum from this date until paid, and all costs of suit, for which let execution issue.

To which action and judgment of the Court in first, overruling its Motion for Summary Judgment and for Judgment on the Verdict of the Jury and in the alternative its Motion for Judgment non obstante veredicto, and, second, in sustaining the Motion of Plaintiff to disregard certain Special Issue jury findings and for judgment on the remainder of said jury verdict, and in entering this Judgment, Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, then and there in open court excepted.

[fol. 85] And to which action of the Court in first refusing to allow him any sum for mental anguish when, in response

to the Special Issue inquiry as to mental anguish the jury answered $1,500.00; and second in granting the Motion for Directed Verdict of Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plaintiff then and there in open court excepted.

Signed and Entered This 3rd day of October, 1960.

A. R. Stout, Judge Presiding, Judge 40th Judicial District Court, Sitting for Judge 101st Judicial District Court of Dallas County, Texas.

Approved as to Form:

Mullinax, Wells, Morris & Mauzy, Attorneys for Defendants, By: L. N. D. Wells, Jr.

Lyne, Blanchette, Smith & Shelton, Attorneys for Plaintiff, By: Robert W. Smith.

Endorsement on Instrument No. 2803

H. N. Borden vs. United Association of Journeymen et al.

Judgment
Recorded: Vol. LL, Page 415

In the Minutes of the 101st Judicial District Court

[fol. 86]

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
101ST JUDICIAL DISTRICT
No. 2803-E

H. N. BORDEN,

VS.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, ET AL.

MOTION FOR NEW TRIAL—Filed October 13, 1960

To Said Honorable Court:

Comes Now Local Union 100, Defendant in the above entitled and numbered cause and moves the Court to set aside the Judgment and decree heretofore made and entered in this cause on October 3, 1960, as well as the verdict theretofore returned by the jury upon the trial of this cause, upon which verdict such judgment was made and entered, and to make and enter an order by which a new trial shall be granted by the Court. As grounds supporting the granting of this Motion this defendant would show:

• • • • • • • •

[fol. 87] 67.

The Court erred in overruling defendant's plea to the Court's jurisdiction that the subject matter of this suit is preempted by federal law to the exclusive jurisdiction of federal tribunals.

• • • • • • •

[fol. 88]

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
101ST JUDICIAL DISTRICT
No. 2803-E

H. N. BORDEN,

VS.

UNITED ASSOCIATION, ETC., ET AL.

ORDER OVERRULING MOTION FOR NEW TRIAL—
November 23, 1960

This, the 23rd day of November, 1960, came on to be heard the motion for new trial filed herein on October 13, 1960 by Local Union 100, a defendant in the above entitled and numbered cause; and such motion having been presented to the Court in due time, manner and form and with due notice, and it appearing to the Court that such motion should be overruled, it is accordingly

Ordered, Adjudged and Decreed that same be, and it is hereby overruled.

To which action and ruling of the Court defendant Local Union 100 then and there in open court excepted, and said defendant then and there in open court gave notice of appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, sitting at Dallas.

Signed and Entered this 23rd day of November, 1960.

A. R. Stout, Judge Presiding, Judge 40th Judicial District Court, Sitting for Judge 101st Judicial District Court of Dallas County, Texas.

Approved as to Form:

Erich F. Klein, Jr., Attorney for Plaintiff.

[fol. 88a] L. N. D. Wells, Jr., Attorney for Defendant.

[fol. 1]

IN THE DISTRICT COURT

DALLAS COUNTY, TEXAS

No. 2803-E

H. N. BORDEN,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, ET AL.

Statement of Facts

APPEARANCES:

Lyne, Blanchette & Smith, Dallas, Texas, By Mr. Robert H. Smith and Mr. Erich F. Klein, Jr., Appearing for the Plaintiff;

Mullinax, Wells & Morris, Dallas, Texas, By Mr. L. N. D. Wells, Jr., Appearing for the Defendant, Local Union Number 100;

Mr. Patrick O'Donoghue, Washington, D. C., Appearing for the Defendants, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, et al.

Be It Remembered That on the 18th day of July, A.D., 1960, the above entitled and numbered cause came on for hearing before the Honorable A. R. Stout, Judge of the 40th Judicial District of Ellis County, Texas, sitting for the Judge of the 101st Judicial District of Dallas County, Texas, and a Jury, and the following proceedings were had:

[fol. 4] (Reporter's Note: the jury having been selected and pleadings read, Court adjourned until 9:30 a.m., July 19, 1960, at which time the following proceedings were had in the presence and hearing of the jury:)

The Court: Call your first witness.

Mr. Klein: Your Honor, we would like to invoke the rule.

The Court: Will all of the witnesses except the parties to the case, which would be the plaintiff and one representative for each defendant, must retire outside of the courtroom and not talk about the case or permit anyone to talk to you about it, unless it should be an attorney on either side.

Mr. Wells: Your Honor, please.

The Court: Yes, sir.

Mr. Wells: May I approach the bench?

The Court: Yes, sir.

Mr. Wells: Actually, this is a suit against the union and each individual who is a member is a defendant. I would take the position that each union member is entitled to be here.

Mr. Klein: Your Honor, if they are taking that position, I take it then that it is also their position that each union member would be an adverse party.

The Court: Is it a volunteering unincorporated associa-
[fol. 5] tion?

Mr. Wells: Yes, it is.

The Court: I think perhaps both of you are correct. All right. Any member of the Local Union 100 is it, is entitled to stay in the court room, all of the rest of you as I stated, retire outside. Do you have a representative here, Mr. O'Donoghue?

Mr. O'Donoghue: Yes, Your Honor, Mr. Mullally, our organizer.

The Court: All right. Someone of your group, I take it, may stay in. Call your first witness.

Mr. Smith: We would like to call as our first witness Mr. H. N. Borden.

The Court: All members of Local 100 can remain in the court room if they so desire.

H. N. BORDEN, the Plaintiff herein, after being duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Smith:

Q. Will you please state your name?

A. H. N. Borden.

[fol. 6] Q. And what is your address, Mr. Borden?

A. 1028 South 17th Street, Corsicana, Texas.

Q. How long have you lived there, Mr. Borden?

A. A couple of years.

Q. Have you lived there off and on over a period of years?

A. Yes, sir, Corsicana.

Q. Are you the plaintiff in this action bringing suit against Local 100 and against the United Association?

A. I am.

Q. Mr. Borden, if you will, please speak up so all members of the jury can hear and the Court and I can hear you, we will appreciate it.

A. Thank you.

Q. Now, I take your attention back, Mr. Borden, to the year 1953, during the first of that year, and ask you what you were doing at that time in the way of earning a living?

A. Working, plumbing, in the plumbing—

Q. Were you a member of any union at that time?

A. Yes, sir.

Q. What union were you a member of?

A. The first of the year, did you say?

Q. Yes, sir.

A. I was in Galveston, Local 200.

[fol. 7] Q. Local 200 in Galveston?

A. Yes, sir.

Q. Is that Local a member of any larger union organization?

A. It belonged to the United Association of Plumbers and Fitters.

Q. All right, sir, is that the United Association one of the defendants in this case, is it?

A. Yes, sir.

Q. Mr. Borden, how long have you been engaged in the plumbing business?

A. Well, I started work at it in 1913 when I was a kid.

Q. And how old are you now?

A. Sixty-four—sixty-three in August.

Q. And how long have you been a member of United Association?

A. Well, that would be back—I have been out of it a couple of times. The first was the early 20's, Local 702 came to Corsicana, and it folded up shortly, didn't stay long, and then when I find out—left about four of us there that lived there, and went to transfer them, and took the charter, we went to check into Waco, that they had no record of us in headquarters, our card numbers. What happened in that local I don't know, but they took our [fol. 8] initiation fees and we worked on there, and when it came to moving our cards, we had no numbers. That was the first of it.

Q. All right, sir.

A. And then I stayed there until 30 something, I don't know what, and I went over to Tyler and joined the union in Tyler in the 30's, now just what year, I think it was '36; then down the line in '46, '47 or '48, there, I wouldn't say just what time, I had a car accident, turned my car over in a ditch. Well, the local was supposed to have kept my dues up; well, when I got to where I could get out again, I found out I was in arrears and I paid a new initiation fee in Longview, 261—261 I believe it was, and therefore I have been a member ever since, paid up member.

Q. All right, sir, you are presently a member in good standing?

A. Yes, sir.

Q. In the United Association?

A. Yes, sir.

Q. All right. In Galveston, Texas, when you were in Local 200, on what project were you working?

A. Well, I worked on the Baylor Hospital the biggest part of the time.

Q. And did you work on that hospital all of the time [fol. 9] during the first part of 1953, or did you have other employment during that period of time?

A. They were on and off, there was a bunch of us that would be on and then we would be off, but I was there, I worked on the lid on the building, I would say I was there the biggest part of the time; there might have been a vacancy of a week or two in it but I don't think there was; to be truthful about it, I am trying to be just as truthful—

Q. Now approximately what date did you cease working on that building and what was the reason that you quit work there?

A. Well, they caught up to where they didn't need but a few men on it and they laid all of us who were considered out of town men off. There were several of us at that time laid off, finished up, that just left a skeleton crew to go on with the job.

Q. About what time was that?

A. The best I recall, it must have been the last of June or around the first week of July and I am not positive but it was in that vicinity.

Q. All right, sir, now after you left that job, did you have any intention of going elsewhere to work?

A. No, sir, I went home.

Q. You went home?

[fol. 10] A. Yes, sir.

Q. And where was home at that time?

A. Shreveport, Louisiana.

Q. And how long did you remain in Shreveport, Louisiana?

A. I stayed there until oh, in about the middle of September.

Q. Around the middle of September where did you go?

A. I came to Dallas.

Q. And why did you come to Dallas?

A. To go to work for the same company I was working for in Galveston, down on the Republic National Bank Building.

Q. All right, sir, why particularly were you coming to work on the Republic National Bank Building?

A. Because I liked the men I had worked with and I liked the men who were down there and it was a good job, and I liked to work on big work.

Q. Had you discussed employment on this project prior to the time you arrived in Dallas?

A. Yes, sir, I talked it over in Galveston. We asked each other where we were going and I told them I was going to rest a while and come on to Dallas and go to work on the bank.

Mr. Wells: If the Court please, I object to any conversa- [fol. 11] tions in Galveston as hearsay, and ask that the jury be so—

The Court: Sustained.

Mr. Wells: —instructed to disregard them.

The Court: I so instruct them.

Mr. Smith: Your Honor, we are not introducing it for the truth of anything that was said at that time. Mr. Borden's response to the question was as to what he discussed at that time and not what anyone else said to him.

The Court: I sustain it.

By Mr. Smith:

Q. Now, Mr. Borden, as a result of any discussions you may have had there, you came to Dallas, is that correct?

A. That is right.

Q. Now when you arrived in Dallas, what did you do first?

A. When I arrived in Dallas, I contacted—I called Mr. Heath on the phone, Mr. Jack Heath.

Q. All right, sir, who was Jack Heath?

A. He was superintendent for Farwell on the Republic Bank Building.

The Court: For who?

A. Farwell Construction Company.

By Mr. Smith:

Q. Now what business is Farwell Construction Company engaged in?

[fol. 12] A. They are a Mechanical Contracting Company.

Q. Does that mean they are a plumbing company?

A. Plumbing and contracting in general.

Q. They have the plumbing work on that particular building?

A. That is right.

Q. And he was superintendent for Farwell Construction Company on that project, is that right?

A. That is right.

Q. Now what company were you working for in Galveston?

A. Farwell Construction Company, the same one.

Q. Is this the same Farwell Construction Company in Galveston working on the Republic Bank Building?

A. That is right.

Q. All right, sir, after you talked to Mr. Heath, what did you do?

A. I went to my brother-in-law and spent the night.

Q. Who is your brother-in-law?

A. Mr. Seago, Walter Seago.

Q. Does he live here in town?

A. He lives here in Dallas.

Q. You spent the night there. Now approximately what date was that, Mr. Borden?

A. Oh, it must have been 14 or 15, around the middle of the month.

[fol. 13] Q. What month was this?

A. September.

Q. Of 1953?

A. That is right.

Q. All right, after you spent the night with your brother, what did you do the next day?

A. I went down to the union hall.

Q. Now which union hall was that?

A. Local 100 down on Ervay Street.

Q. And why did you go to Local Union 100 at that time?

A. To present myself to the business manager as I am supposed to do.

Q. All right, now, when you walked in there, who did you see in the union hall, who did you talk to at that time?

A. Mr. Cleo Lanham.

Q. What position did Mr. Cleo Lanham hold in Local Union 100?

A. He was business manager.

Q. All right; now where were you and where was Mr. Lanham when you first saw him?

A. He was in his office upstairs, 27½ Ervay Street, I believe is the correct address.

Q. Mr. Borden, I would like for you to tell the jury just what the setup is up there on the second floor of Local Union 100, or at least, the setup at that time?

[fol. 14] A. Well, it was upstairs, and you come around the stairway and there is an office there in front, they have a door, but it stays locked; they have a pigeonhole window there that you can talk to, I knocked on this little window, a man opened it, I stuck my hand out to him and told him who I was.

Q. Mr. Borden,—

Mr. Wells: Excuse me just a minute. What kind of window did he say, pigeonhole?

A. Pigeonhole window.

Mr. Wells: Pigeonhole window.

Q. In other words, you have to make a response before you can talk to anyone at that particular window?

A. Well, it is usually closed up and nobody in there but the office force.

Q. All right. Did you go up there and was the window closed when you went up there this time?

A. Yes, sir, it was closed.

Q. And did you knock at that time?

A. Yes, sir.

Q. Was Mr. Lanham the one that opened the window?

A. That is right.

Q. What did you say to Mr. Lanham at that time and what did he say to you?

A. I stuck my hand out and told him who I was, he said, [fol. 15] yes, I handed him my due book as a man should do, and he said, "Yes, I have had a call on you", I told him I had come here to go to work on the Republic Bank, that I had been working for Farwell, and he blowed his top and said, "I have had a call on you", and said, "You are not going to work."

Q. He said, "You are not going to work" at that time?

A. That is right.

Q. Now did you have any union credentials with you at this time that you presented to Mr. Lanham or not?

A. I had a paid up due book, which ordinarily is enough to go anywhere.

Mr. Wells: Your Honor, please, I move to strike the last part of the answer as not responsive and immaterial at the present time. The effect of the paid up due book and further it is a conclusion of law and invades the province of the Court.

The Court: Beyond, "I had a paid up due book", I sustain.

Mr. Smith: I would like to have this marked for identification, please.

(Reporter marked instrument as Plaintiff's Exhibit No. 1 for identification.)

Q. Mr. Borden, I hand you what has been identified as Plaintiff's Exhibit Number 1 and ask you if you have seen that book before?

[fol. 16] A. I certainly have.

Q. I ask you to tell the jury what that book is?

A. That book is, shows a paid up membership to United Association of Journeymen Plumbers and Apprentices and Steam Fitters and Welders.

Q. And what do they call that book, Mr. Borden?

A. That is what they call a due book, and when you don't have a clearance card, if you go to a local to go to work, you can use that the same as—

Q. Mr. Borden, if you will just answer the questions as I ask them, Mr. Wells is going to be objecting to anything else.

A. I am sorry.

Mr. Wells: May we agree that the unresponsive part may be stricken and the jury so instructed?

Mr. Smith: That is agreeable with us, Your Honor.

The Court: Beyond the words, "due book", all right, overruled.

Q. Now, Mr. Borden, will you tell us for what period of time this due book covers?

A. From '53 to '56.

Q. Does it have a stamp affixed for each month during that period of time?

A. Yes, sir.

Q. And what is the effect of the stamp by each month [fol. 17] labelled there, what is the effect of that?

A. That shows that you are a paid member of that month.

Q. Does that mean that you are in good standing at that time?

A. That is right, that is right.

Q. Now is this the book that you presented to Mr. Lanham, or did you present some other book to him at that time?

A. That is the book.

Q. Now at the time you presented this book to Mr. Lanham what did he do with it?

A. He shoved it back to me.

Q. What did he say to you when he shoved it back?

A. Well, he said, "You are not going to work down there on the bank job or for Farwell, you have come in here wrong, you have come in here with a job in your pocket," and I said, "Well—

Q. Now, what did he mean by "with a job in your pocket"?

A. Well, I suppose you can interpret that two or three different ways, I was working for the company and was coming in here to still continue to work for the company and I tried to explain that to him, he didn't want that explaining, he just—I seen he was getting sore, and he shoved the due book back to me and I just picked it up and I turned around and goes downstairs.

[fol. 18] Q. Well, did he seem angry to you at that time?

A. He was getting angry, I could see he was boiling up and so I said, well, I will just go down stairs and cool off, let him cool off a minute, in a little while I goes back.

Q. All right, did you go back that same day?

A. Yes, sir.

Q. About how long after the first conversation was this that you went back?

A. Well, I would say it was a couple of hours, maybe something like that.

Q. All right, now when you went up there did you go through the same procedure of knocking on this window?

A. Yes, sir.

Q. And who answered it that time?

A. He came back to the door, he came back to the window, and he said, "Oh, it is you again", and about the same procedure, that you are not going to work down there, so then I—

Q. What did you say to him when he said, "You are not going to work down there"?

A. He said, "What do you want now?" and I said, "I just want some cooperation, and I come up here to go to work on the bank building and I want some cooperation", and he said, "Well, you are not going to work on the bank [fol. 19] building as long as I am manager of this union, you are not going to work on that bank building", and he closed the door, closed the window.

Q. Did you say anything to him before he got the door closed at that time?

A. I told him I wanted some cooperation and this time he said, "You are not going to work on the bank building and the best thing you can do is get out of town" and closed the window.

Q. All right. He said, "The best thing you can do is get out of town" before he closed the window?

A. Yes, and closed the window.

Q. What did you do at that time?

A. Well, I talked around and talked around and at this time it was lunch time and I goes down the street to the cafe and I eats a bite and went back up around the hall but I didn't go up there and jump him any more, so about 2:00 o'clock I went back out to my brother-in-law's and spent the rest of the evening and that night out there.

Q. All right, now Mr. Borden, you have given some union terminology that you are familiar with and maybe

most of the witnesses here are familiar with, but I am sure maybe the jury would like some explanation and that is as to a call, what is meant by a call?

A. Well, if a man on the job, the superintendent or fore-
[fol. 20] man either one, can call for a member, he can specify any member he wants to and call him out.

Mr. Wells: If the Court please—

Q. Just a minute—

Mr. Wells: I am going to object to any evidence with respect to custom or practice on this job until a predicate is first laid with respect to showing this witness has knowledge as to any custom or practice on the Republic Bank job; the present state of the record is that he just came to Dallas and there is no showing that he had any personal knowledge with respect to this job.

The Court: The question was, I think, what the terminology "call" meant, I am inclined to—

Mr. Wells: Well, we request the jury be instructed not to consider this in connection with what was the custom or practice on the Republic Bank job here.

Mr. Smith: This is not a question as to that particular job, it is a question as to what is a call and the question was merely—

Mr. Wells: I would like the jury be instructed in accordance with counsel's statement.

The Court: I overrule it for the present, that is, I understand you are not trying to go into the matter mentioned in the objection.

Mr. Smith: That is correct.

[fol. 21] The Court: All right, proceed.

Mr. Wells: May the jury be so instructed?

The Court: To what effect now?

Mr. Wells: To the effect that this testimony is not to be considered with respect to whatever custom or practice that was followed on the Republic Bank job.

Mr. Smith: Your Honor, I don't think that that would be a proper instruction for the reason—

The Court: I will leave it like it is for the present.

Mr. Wells: Note our exception.

By Mr. Smith:

Q. Now, Mr. Borden, if you will, state once again what a call is, please, sir?

A. A call is that the foreman or superintendent on any job can call down to the hall, the union hall, and he can call for any member he wants.

Q. Now is this a call for work that you are talking about?

A. For work, yes, sir.

Q. And in response to this call, what is the usual procedure?

Mr. Wells: If the Court please, may I have the same objection—

The Court: Yes, sir.

Mr. Wells: To each of these questions and to this line?

[fol. 22] The Court: Yes, sir.

Mr. Wells: Thank you, Your Honor.

By Mr. Smith:

Q. What is the usual procedure in response to a call?

A. The business agent or the business manager or the general secretary can write a referral and send a man to the job.

Q. All right, now what is a referral?

A. That is to introduce you to the foreman or the superintendent on this job and permit you privilege of going on any job.

Q. In other words, this is to introduce you to the man?

A. That you are going to work for.

Q. —that is hiring on the job?

A. That is right, and if there is a guard at the gate or anything, it still permits you to go through the gate to your employment.

Q. All right, now this first night you had gone back to your brother-in-law's house, Mr. Seago's and spent the night?

A. That is right.

Q. Did you contact anyone with Farwell Construction Company that night?

[fol. 23] A. No, sir.

Q. All right, sir, now what did you do the next morning?

A. The next morning I went back to the hall, the union hall, well, I presented myself back up there to him.

Q. You went back to Local 100, back upstairs?

A. That is right, that is right.

Q. And who did you see when you went upstairs?

A. I believe that Fred opened the door, Fred Zuefeldt opened the window that day.

Q. And what position did Fred Zuefeldt hold in Local 100 at that time?

A. He was the business agent, he was under the manager, his position is under the manager.

Q. All right, is he the man directly under the business manager?

A. I would say that, yes.

Q. He was directly under Cleo Lanham?

A. That is right.

Q. Now was he in this cage that you have described to the jury?

A. He talked to me out of that little, what I call a pigeonhole, a little window is what it is.

Q. Now was there anybody else around there at that time that you could see?

[fol. 24] A. Well, there were a few around there, I didn't know who they were, at the time, and this Uncle Tommie, is all I ever did know his name, the janitor was standing there, he had been cleaning up, he was always standing up there, and he got to be a great friend of mine, he was a nice old fellow, and he heard what was said.

Q. Was anybody else there, were they close enough to hear what was said between the two of you?

A. Oh, yes, anybody that was up on top of that stairway could hear it because it was just a little run-around place up there.

Q. All right, now at this time when you knocked on the window and Fred Zuefeldt came there, what did you say to him and what did he say to you?

A. I talked to Fred the same way as I did him about going to work down there, and he said, "Borden, I can't do anything about it." He said, "You will have to see Cleo, he is the boss."

Q. And what did you say to him at that time?

A. Well, I told him I come in here, I didn't think wrong, I come in here to go to work down there and there wasn't any use of hiding around, just tell a man what you come in to do, I thought the straight thing was the best thing, and so we talked on a little while, and I believe I asked him if Cleo was there, and I believe he said Cleo hadn't came in [fol. 25] that morning, so I goes, leaves down there and goes around the hall there, and talked, and goes up to the restaurant and drank coffee, and until after dinner that day. I goes back out to my brother-in-law, spent the night there again that night.

Q. This is back to Walter Seago's house?

A. Back to Walter Seago's house, yes, sir.

Q. Did you see Cleo Lanham that day?

A. I don't think I saw him that day.

Q. All right, did you talk to Fred Zuefeldt again that day?

A. No, I don't think I talked to him but the one time that day.

Q. And about what time did you leave the union hall?

A. Oh, it was after lunch, it must have been 2:00 or 2:30 before I left the block where union hall was.

Q. All right, after you went back out to Walter Seago's, what did you do?

A. I stayed around there and rested and I was nervous, and I drank coffee, and I don't know what I would tell you, what shape I was in, I was upset all over, and that night, after he came in from work, it was, oh, it was getting, oh, 6:00 o'clock, I imagine, and we had dinner and I told him, I said, "I am going, I am going over and call Mr. Thurman", and so he walked with me up to the drug store up a block or [fol. 26] something of the matter from his house there, and I guess—information finally got Mr. Thurman's number I called, he said, "Well—

Mr. Wells: Just a moment. We object to any conversation with Mr. Thurman. No connection with the defendant and being hearsay as to the defendant.

The Court: Sustain it.

Mr. Smith: Your Honor, before the motion is ruled on, I would like to ask Mr. Borden one question which I think will clear the objection.

The Court: All right, proceed.

By Mr. Smith:

Q. Mr. Borden, who is Mr. Thurman you are speaking of?

A. He is the foreman on the bank job, on the Republic Bank, he was foreman for Farwell.

Q. Is Mr. Thurman a member of any union?

A. A member of Local 100.

Mr. Smith: Your Honor, we think as an adverse party, counsel by his statement to the Court this morning, has cleared that objection. He is a member of Local 100 and being all members of Local 100 being present in court, and treated as adverse parties in this case, Mr. Thurman, any conversation with him, would be conversation with defendant.

Mr. Klein: It would be a declaration against interest also, Your Honor.

The Court: Proceed.

Mr. Wells: May I be heard, Your Honor?

[fol. 27] The Court: Yes, sir.

Mr. Wells: I take it the only complaint, the only complaint in any pleading here is with respect to an alleged agent Lanham, and we have had no notice with respect to being charged with any activities of Mr. Thurman. We are surprised by this turn of events and beyond that, we submit, Your Honor, it is the law that an association is not responsible in law for the words uttered by each and every member of the union, there must be some authorization, or some ratification shown by the association, any other rule would make it impossible for there to be an association, or if an association was to be responsible for every bit of or every word that may be uttered by any of its members.

Mr. Smith: Your Honor, we feel that—

The Court: Under his one allegation in his pleading, I will overrule it.

Mr. Wells: Note our exception.

Mr. Smith: Your Honor, if I may approach the bench, we feel that this point should be clarified not only as to this man, but as to any other member of the union, we feel that any objection that Mr. Wells is making at this time was waived by his position before the Court at the beginning of this trial, that all members of Local 100 could be present in court, even though the rule was invoked, as being members of the union, and if he had any objection, [fol. 28] he waived it at that time.

Mr. Wells: At the proper time I want to make my record of what happened at the time, I don't want to slow the jury down now, but I certainly don't agree with counsel's statement.

The Court: All right.

By Mr. Smith:

Q. Now, Mr. Borden, you called Mr. Thurman and what did you say to him and what did he say to you at that time?

A. Well, I told Mr. Thurman that I was here, that they wouldn't take my book and they wouldn't give me no consideration to go to work for him, and he said, "Well, I will go down and see what I can do." Well, later he went, I don't know when he went down, but the next—

Q. Well, now, I am asking you what you said to him and what he said to you at that time?

A. I told him I was here, and that they wouldn't take my book and they wouldn't allow me to go to work on the bank job down there, and he said, "Well, what did they say was wrong?" I said, "Well, the only—he give me was that I come in here with a job in my pocket," and he said, "Well, I will see what I can do", and so that was about the conversation.

Q. All right, sir. Now tell us again what position Mr. Thurman had with Farwell Construction Company?

Mr. Wells: Is it understood, Your Honor, please, that [fol. 29] without reiterating the objection, that I have that objection every time a question or any conversation with Mr. Thurman is related?

The Court: I presume so.

By Mr. Smith:

Q. Tell us what position Mr. Thurman had with Farwell Construction Company?

A. He was foreman, general foreman.

Q. He was in charge of some phase of the plumbing work out there, is that correct?

A. That is right.

Mr. Wells: Just a moment, if the Court please, I move to strike that answer until a predicate is laid for the basis of this witness' knowledge as to what work Thurman had. There is no showing that this witness was ever on that job site there or had any firsthand knowledge of what Thurman's duties or authorities were.

Mr. Smith: We have no objection—

Mr. Wells: There is a proper way of showing his authority.

Mr. Smith: We withdraw the question.

The Court: All right.

By Mr. Smith:

Q. Now after you talked to Mr. Thurman, what did you do?

A. Goes back down to the hall the next morning, to the union hall.

[fol. 30] Q. Did you talk to anyone else connected with Farwell Construction Company or Local 100 that night?

A. No, sir.

Q. All right, the next day you went down to the union hall and—

A. That is right.

Q. And who did you see at that time?

A. Well, I didn't go up and knock on the window, I just went down there and stalked around down there and talked to first one fellow on the sidewalk and in the street there, around there, and drank coffee, and finally, Fred Zuefeldt had been out somewhere and come up.

Q. And where did you meet Mr. Zuefeldt?

A. You mean that day?

Q. That day.

A. He was there, he was fixing to go upstairs.

Q. This was downstairs on the street?

A. On the street, yes, sir.

Q. All right.

A. I spoke to him and he spoke to me.

Q. What did he say to you at that time and what did you say to him?

A. Good morning, good morning, just as nice as could be, good morning, and I spoke to him, and we talked a word or two and he went on upstairs, and I went on around there, [fol. 31] first one place and then another, that lasted all up until the afternoon again.

Q. Did you speak to Mr. Zuefeldt again about going to work for Mr. Lanham?

A. Not that day.

Q. All right, how long did you stay at the union hall that day?

A. I was around there on that block and down at the cafe there until after lunch, maybe 2:00 o'clock or 3:00 o'clock, I don't know just what time it was in the afternoon.

Q. Were you up there in the union hall very often during that period of time on this third day?

A. No, I don't think I went up the stairs only maybe a time or two, just to see—up and down there, I might have went up a couple or three times, but I didn't go knock on the window or talk to them, I was just giving them time to cool off and I was cooling off, to see what procedure would —I was still waiting to see what was going to happen.

Q. All right, sir, after you left the union hall that day, where did you go?

A. I went back to my brother-in-law's and spent the night.

Q. Did you talk to anyone connected with Farwell or with Union 100 that night?

A. No, sir.

[fol. 32] Q. All right, the next day, what did you do, Mr. Borden, this is the fourth day?

A. The fourth day I went to the union hall, the next morning, and knocked on the door and Mr. Zuefeldt came to the window again and I told him, I said, well—

Mr. Klein: Your Honor, there is one point here I would like to clarify for the sake of the record. Mr. Wells has asked for a continuing objection with regard to all conversation. As I take the ruling of the Court, that does not apply to any conversation that Mr. Borden had with Mr. Lanham, the business manager of 100, or Mr. Zuefeldt, the business agent of that union?

Mr. Wells: That is correct.

Mr. Klein: All right.

By Mr. Smith:

Q. You saw Mr. Zuefeldt on that occasion?

A. Yes.

Q. Now where was he when you saw him?

A. He was in his office and he talked to me out the window.

Q. All right, what did you say to him at that time and what did he say to you?

A. I said, "Well, I am going home and get the boss", and he said, "Well, I wouldn't go get the boss until you get started off to work", and I said, "I didn't mean my wife, I [fol. 33] meant my clearance card."

Q. Your clearance card?

A. Clearance card, that is right.

Q. All right, now what is a clearance card, Mr. Borden?

A. That is good anywhere in the United States and Canada, and must be accepted by all locals.

Q. Well, what is it?

A. It is to clear you from one local to another.

Q. Is that a transfer of membership from one local union to another in the same international organization?

A. That is right, that is right, any local in the United States or Canada.

Q. All right.

A. That is why I call it "the boss", so I goes home.

Q. Now did you stay up there in the union hall and see Mr. Lanham on this day?

A. If he were in the office, I didn't see him, and I couldn't see, only just through that hole, I don't know whether he was even up there or not.

Q. Did Mr. Zuefeldt say anything further to you at that time?

A. Well, I believe he did say, "Well, that is about the best you can do", or something to that effect, or "Are you going to do that?" or "I wouldn't do that", I don't know [fol. 34] what he did say just exactly, but he was nice about what he said, he said, "You see my position", and I went on and got—

Q. Did he explain what he meant by his position?

A. Well, he had a boss over him.

Q. And he said he couldn't do anything, or he wouldn't, or what?

A. No, he didn't do anything.

Mr. Wells: We object to leading the witness.

The Court: Don't lead him, counsel.

A. Pardon me.

The Court: I was talking to your attorney.

By Mr. Smith:

Q. All right, now after you left the union hall, about what time was it when you left?

A. Oh, I would say it was 9:00 or 9:30 in the morning.

Q. All right, where did you go then?

A. Straight to Shreveport.

Q. Straight to Shreveport?

A. That is right.

Q. Now you say you went to Shreveport to get the clearance card over there?

A. That is right.

Q. Were you a member of the union there in Shreveport at that time?

A. That is right.

[fol. 35] Q. Now formerly you had been a member at Galveston local, you said?

A. Yes, sir, when I left Galveston I carried my clearance card with me back to Shreveport.

Q. You transferred your membership from Galveston—

A. Back to Shreveport.

Q. —where you were working for Farwell back to Shreveport?

A. Back to Shreveport.

Q. All right, now, when you got to Shreveport, what did you do?

A. I went home.

Q. All right, and how long were you there?

A. I was there overnight and up until the following Monday.

Q. All right, now did you go up to the local union there at Shreveport?

A. Not until the following Monday morning.

Q. All right, when you went up there, what was your purpose?

A. To get the clearance card.

Q. All right, did you secure a clearance card at that time?

A. I did, I did.

Q. And then what did you do?

[fol. 36] A. I went home and I think the next day, as best I remember, I came back to Dallas the next day; it could have been two days before I come back, but I think it was the next day, to the best of my recollection.

Q. Did anyone come with you?

A. My wife come with me, yes.

Q. All right, now where did you go in Dallas?

A. I brought some suitcases and some stuff and clothes and went right back to my brother-in-law's house, her brother's.

Q. All right, now, did you go by Local Union 100 the day you came back?

A. No, sir.

Q. Did you talk to anyone from Farwell C' struction Company or Local Union 100 on that day?

A. No, sir.

Q. All right, what did you do the next day, Mr. Borden?

A. The next day I goes to the union hall, carries my clearance card.

Q. Did you take your clearance card up to the union hall to the window at that time or not?

A. I did, I took my clearance card with me up to the union hall, up to the window.

Q. All right, did you knock on the window?

[fol. 37] A. Yes, sir.

Q. Did anyone answer?

A. Fred Zuefeldt.

Q. All right, tell us what you said to him and what he said to you at that time?

A. I told him I had my clearance card and he said, "You will have to see Cleo on that because he is the boss, you will have to see Cleo to get that, and so I said, "Well, is he in there?" and he said, "No, he hasn't come in". I watched for him all day and didn't catch him.

Q. Now where did you watch for Cleo Lanham?

A. Well, I stayed downstairs most of the time, down where you could see if he went in, there were just two ways, he could go up the back steps or the front, and on the front I think was the only place you could really get into.

Q. And you were down on the sidewalk?

A. Down on the sidewalk and around the parking lot there, that belonged to Local 100.

Q. Did you see Cleo Lanham that day?

A. I don't think I saw him that day at all.

Q. How long were you up there around the union hall that day?

A. Oh, about the same procedure, until about 2:30 or maybe 3:00 o'clock in the afternoon.

Q. All right, now at that time, what did you do?

[fol. 38] A. I went back to my brother-in-law's.

Q. Did you talk to anyone with Local 100 or with Farwell that night?

A. Now you say Local 100, I might have talked to some of them downstairs, that was a member of the local, that I didn't know the man or something, but so far as the office force, I talked to Fred Zuefeldt, is the only one in the office force.

Q. All right, now, what did you do the next day?

A. Come back to the union hall.

Q. Did you see either Fred Zuefeldt or—

A. I asked Fred was Cleo around, and he said, no he wasn't in there, and so I watched for him all that day, I believe I seen him leave one day, that day I believe I seen

him leave in his car, but I didn't get to talk with him, and I believe—I don't believe I seen him any more but that one time that day, and he was leaving in his car.

Q. In other words, you weren't close enough to have any conversation with him at that time?

A. No, no.

Q. Did you talk to Fred Zuefeldt that day any further?

A. I don't think I did, I don't think so.

Q. All right, now, what time did you leave the union hall that day?

A. About the same procedure after lunch, 2:30 or 3:00 [fol. 39] o'clock, somewheres along there in the afternoon.

Q. And then you went back to your brother-in-law's?

A. Yes, went back out there.

Q. And did you have any conversation with anyone that night that was employed by Farwell Construction Company or any officers of the union?

A. No.

Q. What did you do the next day, Mr. Borden?

A. Went back to the union hall.

Q. All right, did you see either Cleo Lanham or Fred Zuefeldt that day?

A. I saw Fred again, Cleo ain't there. Well, I did catch him I believe that day, along I believe, it was about right after lunch or just before lunch time, I saw him get out of his car and go in the place across the street where they drink coffee or you could drink beer if you want it, or drink coffee, across there.

Q. Who do you mean by him?

A. Cleo Lanham.

Q. Would you tell us what you did then?

A. Yes, I goes over there, he was sitting there in a booth, and I walked up and told him I had a present for him and I pulled this card out of my pocket and he said, "Don't hand that here, go up in the hall, get it in the hall". so I said, "After you". We goes up in the hall, he opened [fol. 40] the door and stepped in and I pushed in by the side of him, and he said, "You know I have got to take this clearance card." Now must I say the word he said?

Q. Yes, sir, if you would. Well, did he—is it something you had rather not repeat to the jury for any reason?

A. Yes, sir, it is a little bit rough.

Q. He used curse words or what?

A. Yes, sir, he said, "That don't mean you are going to work by no means", so I left him the clearance card and I walked off.

Q. After he said, "That don't mean you are going to work", what did you say to him?

A. I said, "Well, I will stick around."

Q. All right, then what did you do, Mr. Borden?

A. Well, I stuck around there every day, I was a member of the local then, after he took the card, I was a member of Local 100, I stuck around and had a little more—felt like I had a little more freedom around there, and talked to anybody I felt like talking to, and I talked to anybody that come along in conversation, I stuck around there then for, I don't know, I just couldn't tell you the time, before I went to work so one afternoon, oh, it was—it might have been close to closing time with them,—

Q. Well, Mr. Borden, on that day when you talked to [fol. 41] Mr. Lanham, and presented him with the clearance card, did you have any further discussions with either him or Fred Zuefeldt?

A. Well, I talked to Fred, Fred would speak pretty near every day that he saw him, I would see him, he was either upstairs or downstairs, one, and he would speak, and have something to say, but Cleo, he didn't even consider me as being a human, much less a member of the local.

Q. Well, after he accepted your clearance card, you became a member of Local Union 100, did he speak to you after that?

A. Not any more than he was, just finally, he and Fred came down the steps, Johnnie Cummins and I were standing there talking and Fred says, "Borden, Mrs. Davis wants to see you upstairs."

Q. Who is Mrs. Davis?

A. She was the lady who worked in the office, I suppose you would call her secretary, I don't know, I would take her to be the secretary, because they were going home, I guess they were going home, they were leaving the office, I goes upstairs and Mrs. Davis gave me a work order,

work referral to the Spencer Plumbing Company, and told me where it was at. Well, I looked on it to see who signed it, and Fred Zuefeldt signed the referral, so I went to work.

Q. Now how long was this after you brought your clearance card in that you got this referral?

[fol. 42]. A. It was several days, I couldn't hardly say just what day it was, but it was several days, I tell you that, it was several days.

Q. What did you do with this referral that you obtained?

A. I presented it to the steward on the job down here at the Medics Building on Gaston Avenue.

Q. All right, now, did you start to work on that project?

A. I did.

Q. For Spencer Plumbing Company?

A. I did.

Q. And how long did you work for Spencer Plumbing Company?

A. Oh, I would say about eight weeks, I imagine about eight weeks.

Q. Now, after you had worked for eight weeks, did they discharge you because you had caught up on the job?

A. Yes, sir.

Q. Or did you quit, or just what happened?

A. No, I was laid off, you know, they would put a bunch on and catch up and then they would lay a bunch off, that is the way it goes.

Q. Now after they laid you off, what did you do?

A. I goes back to the hall for other work.

Q. All right, did you have any conversations with Cleo [fol. 43] Lanham during this period of time, after you had been laid off from the Spencer Plumbing Company job?

A. I believe he asked me what was the matter, and I told him I was laid off, and I believe at that time I asked him, I said, "Well, I still want to go to the bank."

Q. Did he make any response to you on that?

A. No, no, every time I got a chance, I would kick the bank to them, I wanted to go to the bank, that is where I wanted to work, I wanted to work on the bank, it was a big job and I wanted it.

Q. Did he say anything further to you between the time

that you had been laid off the Spencer Plumbing Company job and the next job you went on about whether or not you were going on the bank building?

A. I believe he told me at one time that I wasn't going on the bank after that, I believe I mentioned it to him and he said, "Well, you are not going on the bank."

Q. All right, did you have any conversations with Fred Zuefeldt in this regard?

A. Yes, I mentioned to Fred about going on the bank, and he still says he is the boss.

Q. He wouldn't take a position one way or the other, he just said—

A. He didn't.

Q. —that Lanham was the boss?

[fol. 44] A. He didn't take any position.

Q. Well, now did you discuss your problem about going on this bank job with one or two other members of Local 100 or did you discuss it with numerous members of Local 100?

A. No, it was numerous of them that I come in contact with in talking with, down around the hall, on a Saturday or two there, there would be a whole gang of them come in there paying dues, and I talked with several of them.

Q. All right, did you have any conversations with Mr. Thurman during this period of time?

A. Yes, I think I did.

Q. Where were you and where was he at the time this conversation took place?

A. I met him in a grocery store, me and my wife, and he was in the grocery store buying groceries—excuse me.

Q. And what did he say to you and what did you say to him at that time?

Mr. Wells: The same objection, Your Honor.

The Court: All right, it is overruled.

By Mr. Smith:

Q. What did you say to him and what did he say to you at that time?

A. I believe he asked me did I ever get on a job and I told him yes, I had been working a little bit for Spencer

and at the time, I think, when I met Mr. Thurman, I think I was working for Spencer at the time, before I got laid off [fol. 45] there, and I told him, I said, "I still want to come down there," and he said, "Well, you just have to fight your way through them, you can come down any time you want to, any time they will let you go, there is a job down here for you."

Q. All right, now did you get any other referrals for work from Local Union 100?

A. Yes, in a little while they gave me—Fred gave me a referral out to Keiffer's, Charlie Keiffer's, I believe it was.

Q. Is this Keiffer Plumbing Company?

A. Yes.

Q. For what project was this referral?

A. That was on a doctors buildings, medics building right next to the big hospital on Harry Hines Boulevard.

Q. All right, now how long was it between the time that you were laid off on the Spencer Plumbing Company job and the time you went to work for Keiffer Plumbing Company?

A. Let's see, just exactly, I couldn't say, but it was a week or so, maybe longer.

Q. Now how long did you work for Keiffer Plumbing Company?

A. Well, it must have been about ten weeks, something like that. I would say that was in the neighborhood of it.

Q. Why did you quit working on the Keiffer job?

[fol. 46] A. The same thing, we caught up, and there were about seven of us laid off at the same time.

Q. All right, now did you receive any other referrals from the union?

A. I did. I received one to go to work for Rose Plumbing Company on the General Electric Building on Garland Road.

Q. Now how long was it between the time you were laid off on the Keiffer job until the time you began working on the Rose job?

A. It must have been a couple of weeks, something like that, I would say around that time.

Q. How long did you work for Rose Plumbing Company?

A. It wasn't too long, it must have been four or five or six weeks, got out of the ground and that was about all.

Q. Why did you quit working on the Rose Plumbing Company job?

A. We were laid off, laid off, caught up.

Q. About what time was it you were laid off this Rose Plumbing job, we have been talking in weeks, let's identify it now as to month and year?

A. That was up in '54.

Q. About when in '54?

A. Oh, I would say it must have been around March.

Q. March of '54?

[fol. 47] A. I think that would be pretty close to it.

Q. All right, now, Mr. Borden, did you receive any other referrals from Local 100 between the time you were laid off from Rose Plumbing Company and September 15, 1954?

A. May I check there, I believe I am ahead of myself, I believe it was later than March, I believe it must have been April or May.

Q. All right.

A. Scratch that out, I believe I am about nearer right that way, it has been so long to remember all of them dates, it is hard.

Q. That has been some six or seven years ago now hasn't it?

A. Yes, sir.

Q. April or May you say you were laid off?

A. That was the time, I guess that would be nearer correct.

Q. All right, between the time you were laid off on the Rose Plumbing job and September 15, 1954, did you receive any other referrals from Local Union 100?

A. Yes, I got one more and that was for the Texas Plumbing Company out of Houston, Texas, Ralph Yarbrough was the owner.

Q. Now what project was that?

A. That was on a housing project off of Illinois over [fol. 48] there.

Q. All right, now when did you begin work on this project, Mr. Borden?

A. Well, that must have been—that must have been along about the last of August or somewhere in August when I went to work the last of August, I believe.

Q. The last of August?

A. I believe it was along about that time, the very best I can remember.

Q. All right, now, how long did you work for them, did you continue to work for them rather, until September 15, 1954?

A. Well, it come a lot of rain, and we were off a lot, but I was on their payroll up until about the last of October because I quit there and went to work for the Dallas Independent School Board November 1st.

Q. All right, Mr. Borden, during the period of time when you began—when you first came to Dallas around September 15, 1953, and—

A. Uh-huh.

Q. Up until September 15, 1954, did you ever receive any referrals to the Republic National Bank job?

A. No, sir.

(Reporter marked instruments as Plaintiff's Exhibits Nos. 2, 3, 4, and 5 for identification.)

[fol. 49] Mr. Wells: We can save some time by stipulation if those are the tax returns.

Mr. Smith: It is stipulated by and between Plaintiffs and Defendants that Plaintiff's Exhibits 2, 3, 4 and 5 represent withholding statements on employment by Mr. Borden during periods indicated and for the amounts of money thereon.

By Mr. Smith:

Q. Now, Mr. Borden, I will show you what has been identified as Plaintiff's Exhibit Number 5, which has been introduced into evidence, and ask you if the amount represented there, and how much is the amount represented as total earnings?

A. $602.25.

Q. And that was earned with Texas Plumbing Company, was it not?

A. Yes, sir.

Q. And that was the last job that you were referred to, is it?

A. That is the last one until I went to work for the School Board.

Q. All right, now did this particular income of $602.25 cover the period from August until November 1?

A. That was all.

Q. When you started to work for the Independent School Board?

[fol. 50] A. Yes, sir.

Mr. Smith: I would like to introduce these into evidence, Your Honor.

The Court: Proceed.

Mr. Smith: I will show them to the jury. I have no further questions at this time.

Mr. Wells: Shall I cross examine or would you prefer a recess?

The Court: No, go ahead, I guess, we have been here about an hour, we will go another thirty minutes, I guess.

Mr. Wells: All right.

Cross examination.

By Mr. Wells:

Q. Mr. Borden, your exhibit Number 1 is your book showing the stamps?

A. Uh-huh.

Q. Showing that you paid dues in the United Association. Could you help me here to show just when it was you started paying dues in Dallas, now you have got your thumb on the lower left-hand corner of a page here, showing a payment on November 7, 1953, is that right?

A. That is the way it looks, it looks like that is the first 100 stamp that is in there.

[fol. 51] Q. Actually, you had paid your dues in Shreveport there up through October, is that correct?

A. Up through October.

Q. The first dues payment you made in Dallas was on November 7, 1953?

A. That is the way it shows in the book.

Q. Do you have any reason to think that is erroneous?

A. No, sir.

Q. How did you pay your dues, did you come down to the hall to pay them or were they checked off?

A. I paid them at the hall in Dallas, yes, sir.

Q. Just came and made the cash payment there at the hall?

A. That is right.

Q. Did you do this on a monthly basis?

A. Well, I wouldn't say I never did get in arrears, I wouldn't say what time of the month I paid them.

Q. The booklet shows date on canceled stamps, do you have any reason to believe that the dates there shown are in any way erroneous?

A. I don't see anything wrong with the dates.

Q. All right, sir.

A. I don't see anything wrong with the stamps or the dates either.

Q. Now it is true, is it not, Mr. Borden, that you never [fol. 52] did go down to the job site here at the Republic Bank and ask for a job?

A. Now you mean did I go down there and ask somebody for a job?

Q. Yes, sir.

A. No, sir.

Q. Actually, you had been working in Galveston on a hospital down there, is that correct?

A. I had worked there on a hospital.

Q. Do you know a Mr. Walter Thurman?

A. I certainly do.

Q. Was he your supervisor on that job in Galveston?

A. He was foreman on it.

Q. It was he who told you that you were going to be laid off down there?

A. Yes, was the one that presented us, give us the checks.

Q. And do you recall when he told you there was going to be a layoff at the end of the week, you said, if that is the way it is going to be, I will just take out now and quit?

A. I don't recall that.

Q. Would you say that was not so?

A. Well, on the job you can hear most anything, but I don't recall ever saying it.

[fol. 53] Q. Would you say that you did not say that?

A. So far as I know, I would.

Q. Well, you know whether or not you said it?

A. I don't recall saying it, I will be honest with you.

Q. And that is as far as you will go, you won't say you didn't say it?

A. Well, either way, I am not sure, I just don't recall saying it.

Q. All right, sir. Now if the records of the Farwell Company show that you quit in Galveston in April of 1953, would that—on April 16, 1953, would that make any difference in your testimony, where you say you left down there in June or July?

A. Well, I was there in June and July, I know.

Q. Well, do you know Mr. Billy Carter with the Farwell Company?

A. I have met the gentleman, yes.

Mr. Wells: Would you mark this, please?

(Reporter marked an instrument as Defendant's Exhibit Number 1 for identification.)

By Mr. Wells:

Q. I hand you what has been marked for identification as Defendant's Exhibit 1—pardon me, may I show it to your lawyer first?

A. Yes.

[fol. 54] Mr. Smith: If the purpose is to introduce this into evidence, we have an objection to the introduction.

The Court: May I see it?

Mr. Wells: May I prove it first?

Mr. Smith: Or any questioning in regard thereto.

The Court: I will let him put his question.

Mr. Wells: Thank you, Your Honor.

A. I want to see that, please.

Q. All right, sir.

Mr. Smith: Note our exception.

Q. Now, I have handed you what has been marked for identification as Defendants' Exhibit 1, is that a letter on the letterhead of Farwell Company, Inc., signed by Farwell Company, Inc., by Billy R. Carter, sir?

A. Excuse me, let me read this.

Q. I am sorry, sir.

Mr. Smith: Your Honor, we object to any question in regard thereto unless he can prove that Mr. Borden knows Mr. Carter's signature and can verify the authenticity of the document; it has not been proved by any competent evidence and certainly Mr. Borden is not qualified to prove the evidence.

A. Well, I worked there—

Mr. Smith: Mr. Borden, we have an objection. The Court has not ruled; wait until the Court has ruled on it, [fol. 55] please.

The Court: Well, it got to where he was about to ask him a question, and he said, let me see that, and he is looking at it.

Mr. Smith: I think he did ask him a question, Your Honor.

The Court: What was the question?

Mr. Wells: I will restate it.

Q. I have handed you Defendants' Exhibit 1 for identification, on the letterhead of Farwell Company, Inc., signed for Farwell Company, Inc., by Billy R. Carter; you testified you know Mr. Carter?

A. I have met him.

Q. Is that his signature?

A. I wouldn't know, I wouldn't know whether that—

Q. You just don't know whether that is an authentic letter or not?

A. No, sir.

Mr. Wells: We won't offer it at this time. We will prove it up later, Judge. Would you like to read it?

A. I have read it.

Q. Are you through with it now?

A. Yes, I may want it at a later date.

Q. All right, we will have it right here. If the records of Farwell Company, Inc., indicate that you were employed [fol. 56] on the John Sealy Hospital project in Galveston, Texas, from June 11 to November 26, 1952, under Mr. R. L. Roton, would you dispute those records?

A. I was working on the job and Mr. Roton was on there as superintendent. He left there long before I did and came to Dallas.

Q. Well, would you dispute a record that showed you worked in Galveston from June 11 to November 26, 1952?

A. No, I wouldn't dispute that, I worked there.

Q. And those dates are correct to your knowledge?

A. I wouldn't say they were correct, because I don't keep a record of stuff like that; I wouldn't say they are incorrect or correct.

Q. If those records further show that you went back to work in Galveston on February 18, 1953, and worked until April 16, 1953, would you dispute those records?

Mr. Klein: Your Honor, we are going to object to this line of questions.

The Court: Sustain it.

Q. Do you recall the dates you worked in Galveston?

A. Not exactly, now, sir. It is hard to keep up with it but I am sure that date is not correct.

Q. Which date is that?

A. The last one you read off there.

Q. April 16, 1953?

[fol. 57] A. Yes.

Q. Do you have any record of the length of time you stayed in Galveston?

A. No, sir, I do not.

Q. Does this book, your Exhibit Number 1, show which local union you paid dues in?

A. It should; the book was issued to me in Galveston.

Q. All right, sir, does it show that the last payment you made in Galveston was on April 24, 1953?

A. It shows that was the last payment.

Q. When does it show you made your first payment in Shreveport?

A. Well, we will have to find that out, it shows 141 but it doesn't show the date.

Q. Actually, Mr. Borden, your own dues book, your own Exhibit Number 1 shows the last dues payment you made in Galveston was in April, 1953, isn't that right?

A. That is what it shows on this book.

Q. All right.

A. As I said, it has been so long, these dates, you can't keep dates like that—dates is beyond me.

Q. Would you think now then that perhaps it was April of '53?

A. It could have been.

Q. Rather than in June or July when you left?

[fol. 58] A. It could have been, I live in Galveston half the time when I want to.

Q. Now you left Galveston then either in—probably in April 1953 and what did you do?

A. No, I didn't leave there then, not in April 1953.

Q. Well, perhaps I misunderstood you, when did you leave?

A. I told you I thought it was in June or July.

Q. And despite the dues book, you still think it was June or July?

A. I didn't necessarily have to pay dues, I could have went home and come back to Galveston, I stayed in Galveston a right smart.

Q. And what were you doing in Galveston, Mr. Borden?

A. I have kinfolks all over Galveston, I stay down there when I get ready.

Q. Were you seeking employment?

A. No, sir, if I had been, I would have been working.

Q. And then how long did you stay in Galveston?

A. I just don't know, like I tell you. That due book shows that I cleared out of there and went back to Shreveport, cleared out, and I took my card back to Shreveport in April. I wouldn't say it is not correct, because the book shows it.

Q. All right, did you look for work in Galveston?

[fol. 59] A. No, sir.

Q. Did you look for work in Shreveport?

A. No, sir, I could have worked if I had wanted to.

Q. When did you start looking for work?

A. I came to Dallas.

Q. When did you come to Dallas?

A. In September.

Q. I take it then from either April or June of 1953—

A. Yes.

Q. —up until September, you didn't make any effort to get a job?

A. Well, I wouldn't say that, I might have done a little job or two somewhere, I don't know, I wouldn't say, that has been too far back.

Q. I just want you to tell the jury whether or not you were looking for work during that time?

A. If I had been, I would have been here in Dallas because here is where I aimed to come to go to work.

Q. Well, now, sir, would you please just tell me yes or no whether or not you were looking for work from April of '53 until September of '53?

A. No, sir, I wasn't.

Q. Thank you, sir.

Q. Now when you got here in September, is there any way we can fix that date?

[fol. 60] A. Well, I would say the best I can tell you, it was around the 15th of September, after Labor Day.

Q. You know it was after Labor Day?

A. Yes, sir.

Q. Thank you, sir. Do you have any record that would show you what time that was?

A. No, I don't have any record like that.

Q. So far as you know there is no record in existence that could help this jury find out what time it was you came to Dallas?

A. Not as far as I know.

Q. Now when you came to Dallas, did you know Mr. Lee Roton?

A. I had met Lee Roton, yes.

Q. As a matter of fact, you had worked under him the first of the Galveston Hospital job, hadn't you?

A. That is right, there he was the superintendent.

Q. At that time in, oh, September or October of 1953, Mr. Roton was the superintendent on the Veterans Hospital down south of Dallas, wasn't he?

A. That is right.

Q. And when you came from Shreveport to Dallas, you went by that Veterans Hospital job and had a conversation with Mr. Lee Roton, didn't you?

A. I don't think so. I came down and had a conversation [fol. 61] with him before then.

Q. Now when was it you had a conversation with Mr. Lee Roton?

A. It was early in the spring of '53. Me and my wife came up here, we came by, we stayed all night in Corsicana at my mother's and father's and came on up here and stopped by. That was when I was going down here, coming down here to see about getting an inspector's job on the bank building.

Q. Did you tell Mr. Lee Roton that you were going to get a job from the owner or the architect of the Republic Bank job, inspecting the work, which Farwell put in there?

A. I was going to try to get the job of being an inspector on the building, yes, sir.

Q. Now if you had gotten that job, you wouldn't have been working for Farwell, would you?

A. No, sir, I would have been working for the architects and the owners of the building.

Q. Did you ask Mr. Roton for a job on the Veterans Hospital down south of town?

A. No, sirrie, because he tried—he told me when he left Galveston to come and go with him on that job and I told him I didn't like that Durham fitting, I didn't want that plumbing.

Q. And you are absolutely certain you did not ask Mr. [fol. 62] Roton for a job?

A. No, sir; he offered me a job before he left Galveston on that, and I told him I didn't want that Durham plumbing.

Mr. Wells: Judge, I can make this a lot shorter if I can have ten minutes to go over my notes.

The Court: Well, we will take a ten minute recess.

(Court reconvened at 11:09 a.m. following the recess, at which time the following proceedings were had in the presence and hearing of the jury:)

H. N. Borden, being recalled, continued to testify as follows:

Cross examination (continued).

By Mr. Wells:

Q. Mr. Borden, would you describe for the jury what this cashier window setup is that you have talked about that you say was pulled down, or slammed in your face, or that you had to rap on to open?

A. Well, I judge they have all seen a little sliding window like in a post office there, a stamp window or something like that, that is the general idea of it, something like that.

Q. And is it your testimony that this window on one occasion was closed where you couldn't see through it?

[fol. 63] A. That is right.

Q. What material closed it, a curtain, or board or what?

A. I would say a board.

Q. On your various conversations with Mr. Zuefeldt, or Mr. Lanham, I take it that except on the one occasion when you tendered him your clearance card, all your conversations were through this window, is that right?

A. Well, I don't recall talking to him in the office but the one time, inside the office, I am telling you now.

Q. All right, now let's follow that one time, that is the one time you had gone back to Shreveport, picked up your clearance card which you referred to as your boss?

A. Uh-huh.

Q. Brought your clearance card back and handed it to Mr.—throwed it down on the table before Mr. Lanham over in the cafe?

A. No, I didn't throw it down on the table, I told him I had a present for him.

Q. I see. Well, perhaps I misunderstood you. Well, in

any event, he said this is not the place to transact business, go on up to the hall?

A. That is right.

Q. And you and he then went on directly to the hall?

A. I said, "After you."

[fol. 64] Q. And you followed him right on up to the hall?

A. Correct.

Q. And went into his office there?

A. Went into the office at that time.

Q. Now who was present at that time?

A. I don't know, this lady might have been in there, I wouldn't say that she was or wasn't. I think she was, I don't know.

Q. That would be Mrs. Davis who was the bookkeeper or a secretary of some kind?

A. One or the other, yes.

Q. And anybody else at that time?

A. I don't recall whether there was anyone else in there or not.

Q. All right. Now any other conversations that you had would have been through the window, is that right?

A. That is right. The office wasn't open for all of the members to be in and out.

Q. And who if anybody was within earshot of those other conversations?

A. I don't believe I understand it just right.

Q. Who could have heard those other conversations?

A. Well, most anybody out there in the hallway could hear it, anybody.

Q. Was Mrs. Davis on the other side of that window [fol. 65] from you?

A. Yes, she was—the office—she was back in this part, I would say we were here, and I think there is a door between the two offices from where the window is, I am not sure about that, I think there are, and she sits back like where Mr. Smith is, is where her desk was, and then the window would be over here.

Q. That would be about 15 or 25—you can judge the feet better than I.

A. I am just guessing at it, the distance, but she was back this way, where her office was, and this window was up here at this—there was a door over here that went into that office.

Q. And it is your best judgment about as far as from me to Mr. Smith?

A. I would say something like that.

Q. About 20 feet?

A. I wouldn't say that is 20 feet, I wouldn't say it was over 10 or 15, I was just roughly guessing.

Q. All right. Now on various occasions when you would be down there at the hall, were there other members of the local around, I believe you said you spoke to some of them there?

A. Well, eventually I got acquainted with some of them but I couldn't say at the time who all there were and who [fol. 66] all wasn't, whether they were members, or whether they were just stalking around there, I wouldn't say.

Q. You do know, at least, let me ask it this way, is it true that men who are out of work in this industry will loiter in the vicinity of the union hall, hoping to get work assignments?

A. Well, I would say that is a place to go get work but I wouldn't say they loaf down there.

Q. Well, waiting for assignments of some kind?

A. Sure, that is the place to get it.

Q. And isn't it true that every time you have been to the Dallas local there have been anywhere from ten to thirty or forty men around there?

A. I wouldn't say that, no.

Q. Well, what is the smallest number at any time you have been there?

A. I have walked up there and there wouldn't be over one or two, maybe there would be a janitor and maybe there would just be visitors around there, or something.

Q. Can you be specific as to any time that you have ever been there when there hasn't been somebody waiting for work?

A. I wouldn't know whether they were waiting for work or what they were there for.

Q. I see. All right. You have been there on occasions [fol. 67] when there are twenty or thirty people waiting?

A. On Saturday morning there will be a lot of them there because they will be paying dues.

Q. And during the week?

A. I wouldn't say about how many would be there, but there would be men around there, or somebody in and out of there during the day, yes, sir.

Q. Well, maybe we can get at it this way, do you remember Mr. Cleo Lanham was defeated in his bid for re-election in December, 1953?

A. Yes, sir.

Q. And he was succeeded by Mr. John Galvin (spelling) G-a-l-v-i-n?

A. That is correct.

Q. Do you remember about the time when Mr. Galvin was elected, there were a good many layoffs around here and there were a whole bunch of people down there in the hall looking for work?

A. No, I don't remember seeing them down there like that.

Q. Well, normally, in the wintertime, doesn't work slacken off?

A. Well, I would say it does on cottage work but not on big construction.

Q. And it is your testimony you just don't recall num- [fol. 68] bers of men down at the hall seeking employment?

A. No, I wouldn't.

Q. What was this man's name you stayed with in Dallas?

A. Seago, Walter Seago.

Q. How do you spell that, please?

A. (spelling) S-e-a-g-o.

Q. What is his business?

A. He is a plumber.

Q. Is he a member of Local 100?

A. No, sir.

Q. He is some kin of you?

A. Wife's brother, half-brother, I believe it is, half-brother.

Q. Now, Mr. Borden, have you ever worked on any job uninterrupted for twelve months?

A. Well, I don't mean—what do you mean, uninterrupted?

Q. Well, suppose you interrupt yourself on Saturday and Sunday, I am talking about 40 hour week, from the first of January until the end of the next December, or for any 12 months period?

A. Well, I never did keep no dates like that, but I am sure I have.

Q. Could you tell us where you have ever worked that [fol. 69] long on one single job?

A. I would say at Oak Ridge, Tennessee.

Q. And when was that?

A. During the war, I wouldn't say what year, I don't remember.

Q. Any other one?

A. That is hard to say, I am afraid I can't answer that.

Q. So far as you can remember right now, that is the only one you ever worked—

A. I am going to tell the truth, and I am afraid I can't answer that correctly.

Q. All right. Now, Mr. Borden, you recall you gave a deposition in this case at one time?

A. Yes, sir.

Q. Do you recall testifying at that time that you did not have any kick against John Galvin?

A. Well, at that time—

Q. Excuse me just a minute, would you answer that yes or no, and then make any explanation you would like to make?

A. Give me that question again.

Q. Do you recall testifying in that deposition that, "I did not have any kick against John Galvin"?

Mr. Klein: What page are you on now?

Mr. Wells: I am on page 91, line 17.

[fol. 70] A. We didn't have no fuss, say fuss, I don't say we didn't have—didn't feel toward him one way, but we didn't have any real fusses about it.

Q. Referring to page 91 here, line 15, "Question: Did you tell them that after Mr. John Galvin came in office that you got work?" "Answer: I did not have any kick against

John Galvin." Is that an accurate transcription of the question and answer?

A. I said it then, and I will say it now.

Q. You will say it again now?

A. Yes.

Q. All right, and Mr. Galvin was elected in December of 1953 and took office the first meeting in 1954, which would be early in January in '54, is that right?

A. I would say yes.

Q. Now if the records show that you went to work for the Spencer Plumbing Company on October 13, 1953, and worked there through December 17, 1953, would that refresh your recollection, as to the exact dates?

A. Well, it is like I told you, I don't know what date it was, no, I don't, I am going accordingly to what I made on account of the time the best. I remember that I worked for them, I am trying to be honest and tell you the truth.

Q. You are asking the jury to give you some damage [fol. 71] for that period in there and we would like for you to be just as specific as you can as to what dates you worked.

A. Do you have a record showing what date I went to work?

Q. October 13, '53, to December 17, '53, the best information that I could get, is that right?

A. Did you get that from Spencer?

Q. Mr. Galvin got it from Spencer.

A. If that is from Mr. Spencer, I can't object to that.

Q. All right, sir.

Mr. Smith: Your Honor, we object to counsel testifying as to the authenticity of any documents within his file unless he proves it, propounding questions to the witness on unproven evidence.

The Court: Sustain it.

Mr. Smith: And ask the Court to instruct the jury not to consider it.

The Court: Well, it is a good objection, I don't want to get on the weight of the evidence, as to what may have proceeded here, I sustain the objection.

Mr. Smith: All right.

By Mr. Wells:

Q. Well, in any event, you worked at that Spencer job from October until December, didn't you?

A. I would say somewhere in that vicinity, yes, sir.

[fol. 72] Q. Up until almost Christmas time?

A. It was about six or eight weeks, as I said, I worked, now what time I went to work and what time I laid off, I can't give you them dates.

Q. All right, but in any event, the election at which Mr. Galvin defeated Mr. Lanham was held in December, wasn't it?

A. If I understand correctly, or remember correctly, the first Saturday after Christmas, it was held on a Saturday morning.

Q. Between Christmas and New Years?

A. Yes, the first Saturday after Christmas, I would say that was the time.

Q. Were you still working for Spencer at the time of that?

A. I don't remember.

Q. You were campaigning a little bit for Mr. Galvin and against Mr. Lanham, weren't you?

A. No, sir, I weren't campaigning for nobody.

Q. Now referring further to this deposition, Mr. Borden, I am referring to page 107 of your deposition, at line 5: "Question: Have you ever been in any other litigation, any other lawsuits?" "Answer: I have never been arrested in my life."

A. That is correct.

[fol. 73] Q. "Have you ever filed a lawsuit against anybody?" "Answer: I never have filed a lawsuit against anybody." Was that your testimony on deposition?

A. This is my first one.

Mr. Wells: I will ask the reporter to mark for identification a certified copy of a certain petition in a cause entitled Harm Newton Borden, also known as H. N. Borden, and Newt Borden, versus James Patrick Brady, et al, Number 55878 in the 4th Judicial District Court in Ouachita Parish, State of Louisiana, bearing certificate of R. D. Farr, clerk of the court.

A. That was after this one, am I correct?

(Reporter marked instrument as Defendants' Exhibit Number 2 for identification.)

Q. Then I will ask the reporter to mark for identification an amended and supplemental petition in that same cause entitled, H. N. Borden versus Brady, as Defendants' exhibit next in order.

(Reporter marked instrument as Defendants' Exhibit Number 3 for identification.)

Mr. Wells: The amended petition was filed the 2nd day of February, 1959, the lawsuit was filed October 17, 1958.

Q. Now Mr. Borden, you have testified that you gave a deposition in which you were asked, "Have you ever filed a [fol. 74] lawsuit against anybody?" "Answer: I never have filed a lawsuit against anybody." That deposition was given here in Dallas at your lawyer's office, Mr. Smith's office, on the 30th day of April, 1960, was it not?

A. Yes, sir.

Q. Now, actually, as a matter of fact, on the 30th day of April, 1960, you had filed a suit—

A. Well,—

Q. Against a Mr. Brady and against a labor union over in Monroe, Louisiana, had you not?

A. Yes, sir, but I said that was my first one, that is a misprint in that thing there, or something.

Q. Now you had actually filed a suit on the 14th day and had made affidavit on the 14th day of October, 1958, had you not?

A. That is right.

Q. Before Mr. Holloway, a notary public over in Louisiana?

A. Yes.

Q. And you understood that you were filing this lawsuit against that union over in Monroe, Louisiana, back in 1958, did you not?

A. Yes.

Q. And as a matter of fact, an amended pleading was filed in that lawsuit over in Louisiana in 1959, was it not?

[fol. 75] I am handing you Exhibit Number 3. I will ask you to look these papers over, Mr. Borden, and tell us whether or not they are actual copies, photo copies of papers you filed over there in the Louisiana court; have you looked those over, Mr. Borden?

A. I guess it is enough.

Q. And those are the copies of the papers in the lawsuit?

A. I turned it over to a lawyer.

Q. You turned it over to him?

A. Yes, I turned it over to him.

Q. Well, you did more than turn it over to him, didn't you, you signed an affidavit on the 14th day of October 1958; that is your signature on Exhibit Number 2, isn't that right?

A. Yes, that is my signature.

Mr. Wells: We offer these in evidence, if Your Honor, please.

Mr. Klein: We would like to look at them, Your Honor, please. We have no objection.

The Court: May I see them. All right. Proceed.

Mr. Wells: Thank you, Your Honor.

By Mr. Wells:

Q. Mr. Borden, having filed that lawsuit in 1958 and amended it in '59, why did you testify on April 30, 1960, that you had never filed a lawsuit against anybody?

[fol. 76] A. I tell you, that should have been this was the first one, I told you that, I—a misprint in that reading. The first one, or it should have been, if I had noticed that in reading it, I would have changed it, that should have been this was the first one.

Q. That was just a mistake?

A. Yes.

Q. Well, you testified up here at one point, "I never have filed a lawsuit against anybody", and then further on down here, "I take it then that you have never been a litigant in the courthouse and you have never sued anybody or never been sued by anybody?" "No, sir." Is that right?

A. I haven't been sued, but this is the first one here you are speaking of, the way the question was asked.

Q. But then it was asked you again, as to whether or not you had ever been a litigant, and whether you ever sued anybody or had ever been sued by anybody.

A. I have never been sued.

Q. But your answer to the second question was "no, sir".

A. I probably didn't get that question correct because I didn't intend to make that.

Q. Now further in this deposition, Mr. Borden, do you [fol. 77] recall that you agreed that the first time you presented your clearance card to Mr. Lanham, he accepted it?

A. When I got to him, he accepted it the first time, when I got to him. He had to accept it.

Q. How old are you, Mr. Borden?

A. I will be sixty-three years old the 14th of next month.

Q. Now that it has been recalled to your mind that you are suing the labor union over in Monroe, Louisiana, and you are suing this one here, have you ever sued anybody else?

A. No, sir, that wouldn't have been sued if it hadn't been for this right here.

Q. Could it be as you get in your sixties you are just going to retire on some litigation?

A. No, sir.

Mr. O'Donoghue: I have one or two questions.

Cross examination.

By Mr. O'Donoghue:

Q. Mr. Borden, Mr. Lanham and Mr. Zuefeldt, they are all officers of Local Union 100, are they not?

A. They were at that time.

Q. And these members that you talked to around the hall during the months of September, October and Novem- [fol. 78] ber 1953, they were all members of Local 100, were they not?

A. I suppose they all were, I suppose they were.

Q. After Mr. Lanham—you had this difficulty with Mr. Lanham and Mr. Zuefeldt, you did not notify any representatives of the United Association did you?

A. Yes, sir.

Q. Who did you notify?

A. The man sitting there on your left.

Q. When was that, Mr. Borden?

A. He came over to Dallas right after the election, I met him on the sidewalk there, shook hands with Jeff and talked to him and he asked me how I was getting along, and I told him I wasn't.

Q. When was that?

A. That was right after the election, about the time Galvin went in or a little after, I don't remember just what time, but it was along there somewhere.

Q. That would be December or January?

A. It would be in '54, it was after Johnny was in office.

Q. And what did you say to Mr. Mullally at that time?

A. He asked me how I was getting along, and I told him, I wasn't, I told him something about the trouble, and he was trying to get upstairs, and he said, "Well, I don't know [fol. 79] what we are going to do with this down here yet, we are having quite a bit of trouble down here with this local.

Q. Well, what specifically did you tell him about your trouble?

A. I told him that I was having trouble getting on a job I wanted to go on.

Q. That was the National Bank job?

A. That was the Republic National Bank.

Q. Did you tell him that Mr. Lanham or Mr. Zuefeldt were preventing you from going on that job?

A. I told him I was refused to go on the job, refused to let go on the job, and he was trying to get up the steps, he didn't stop and give me much consideration about what I was having trouble.

Q. Were there a number of people around at this time?

A. I don't know how many were there, I wouldn't say, he come across the street, and was trying to go up the steps when I caught him.

Q. Was anyone with him?

A. I don't think there were, I think he was by himself, he was just coming in.

Q. Well, did he stop to talk to you?

A. Very little you might say talked walking.

Q. For what period of time did he talk to you, a minute [fol. 80] or two minutes?

A. It is hard to say, it wasn't very long, that would be hard to answer correctly.

Q. Well, prior to this event in December or January, you hadn't notified anybody from the UA, had you?

A. Nothing only the chairman of the Executive Board, I would try to talk to him.

Q. I say a representative of the United Association?

A. No, Jeff is the only one I talked to.

Q. Mr. Mullally is the only representative in the State of Texas, is he not?

A. Well, I suppose he was at that time.

Q. He is what we call a general organizer.

A. General organizer.

The Court: General what?

Q. General organizer.

A. General organizer.

The Court: Yes, sir.

Q. Now, Mr. Borden, after you talked to Mr. Mullally for the short period of time on that evening, you didn't thereafter write the United Association, did you?

A. No, sir, I didn't write to them.

Q. You didn't talk to any representative of the United Association?

A. He was the only one there, the organizer and big shot, [fol. 81] I call it, that I talked to.

Q. And that occurred sometime in 1954?

A. Well, it was after the election, just what time as I said, I can't remember, but it was after the election and Galvin was in office.

Q. You never filed a complaint against any of these officers with United Association, did you?

A. No, I didn't file a complaint with them.

Q. You never wrote a letter to the United Association telling the general president of what occurred?

A. No, sir, I just talked to Jeff there and talked to the chairman of the executive board.

Q. Well, you mean the chairman of the local union?

A. I mean chairman of the executive board of the Local Union 100.

Q. Now in '54, that conversation you had with Mr. Mullally occurred in the evening?

A. I think it was right after lunch, right after the lunch hour, I believe it was, when he come in, I am not for sure now whether it was or not.

Q. Did you meet him outside the local union hall?

A. On the stairway there, on the sidewalk.

Q. On the sidewalk?

A. On the sidewalk where we stood around.

Q. Were you right in front of the door?

[fol. 82] A. I wouldn't say that.

Q. You say you walked along with Mr. Mullally, how far did you walk?

A. No, I didn't say—well, I would say probably five or six foot there, the space between the sidewalk there where we hung around and the shade over it, if you need a shade, and if you didn't need a shade, there was room to stand around, four or five men to stand out around there.

Q. And you talked to Mr. Mullally as he walked up?

A. Right there as he come up, I shook hands with Jeff and we worked together back a good while ago, we knew each other very well.

Q. And then he walked up the stairs?

A. Yes, he was going at the same time he was talking to me.

Q. He kept walking?

A. He kept trying to get on up the stairs with me talking to him.

Mr. O'Donoghue: I have no further questions.

Mr. Klein: Your Honor, if we might put one thing in the record, I believe Mr. Borden simply identified Mr. Mullally as the gentleman sitting on your right. We would like for the record to reflect that that gentleman is Mr. Jeff Mullally.

[fol. 83] A. Jeff Mullally.

Mr. Klein: About who this testimony is concerned.
The Court: That is correct, is it?
Mr. O'Donoghue: That is correct.

Redirect examination.

By Mr. Smith:

Q. Mr. Borden, I hand you Exhibit Number 1 which you have identified as a dues book, the same document that Mr. Wells was questioning you about, and he asked you to identify the date as April 24, 1953, as the last time you paid dues in the union in Galveston, Texas. Now the next place for a stamp is May, 1953, and will you tell us what that stamp reflects?

A. That looks like June 6 on the stamp in writing.

Q. And what union was that paid to?

A. At 141, Shreveport, Louisiana.

Q. So the May dues were paid in June 1953?

A. That is right.

Q. Now, after looking at both stamps, can you tell for sure exactly when you left Galveston, Texas, to go to Shreveport, Louisiana?

A. No, sir, I couldn't tell you the exact date, because I had a house down there and was living there at the time, me and my wife were, and her sister lived there, and I [fol. 84] wouldn't say whether we stayed a week or two or three or a month after that, I wouldn't say, I don't remember what date I left Galveston, and we had our house rented out and I don't remember what time we got possession of ours in Shreveport, when we were coming home, whatever time it was we got possession, we went home.

Q. Does payment of dues on April 24th, 1953, at the Galveston local mean that you left there at that time?

A. I cleared out at that time, I am sure that was the last stamp, that was when I cleared out from the local, cleared my clearance card out of there.

Q. And then June 6, 1953, does that mean that was the date you cleared into Shreveport local, or could it have been any time in between there?

A. No, you are supposed to clear in in thirty days, you

can carry a transfer for thirty days, and then you have got to clear in some local and get you another one and go further if you want to.

Q. All right, does that mean that you had to clear into the Shreveport local within thirty days after you left the Galveston local?

A. Yes, I cleared out and we went to Shreveport and notified the people we wanted the house, and I probably cleared at the local and went back to Galveston until I got possession of the house that was rented out.

[fol. 85] Q. If you paid your dues in Shreveport on June 6th, then you could have left any time within thirty days prior to that, is that correct?

A. Yes, sir, could have left most any time.

Q. Mr. Borden, how long did you work on that hospital job in Galveston, Texas?

A. Well, according to the records I have seen—

Q. Well, I am not asking you according to the records you have seen, they have not been authenticated as records, I am asking you to the best of your memory and recollection?

A. I would say I worked on it at least six months.

Q. At least six months?

A. I would say that, that I worked about six months on it.

Q. And where were you working prior to that time?

A. Well, I worked at the Monsanto Plant, a chemical plant there in Galveston, like I say, they put on a bunch and you work a while and then they would catch up and then they would lay off a bunch and then we would go back. I think I went on the job two or three different occasions, I don't know just how many, but I worked at Monsanto Chemical Plant over there, and did some plumbing over there for them, and then I worked for a shop there a while.

Q. All right, now you say you applied for a job as an inspector on the Republic National Bank job, is that correct?

[fol. 86] A. Yes, sir.

Q. Now did you talk to Mr. Roton on the same trip that you made the application for this job?

A. I did.

Q. And what job was Mr. Roton working on at that time?

A. He was working on the Veterans Hospital.

Q. The Veterans Hospital?

A. The Veterans Hospital out in Oak Cliff, I suppose you would call it, way out there.

Q. I think you testified that you didn't ask them to put you on the job because you didn't like Durham plumbing?

A. That is right, he tried to get me to come from the job in Galveston, he told me to come on up and help him on the hospital and I told him, "Mr. Roton, I don't like that Durham work, I can't go, it is too heavy, and I don't like it."

Q. What is Durham plumbing?

A. Well, to explain, it is nothing in the world but screw pipe plumbing, it is hard old work, it is cutting and threading joints, instead of being caked and lead and so on.

Q. Did they have Durham plumbing on the Republic Na-
[fol. 87] tional Bank job?

A. No, sir, that was lead, that was soil pipe.

Q. Now I think Mr. Wells asked you the question that the only time you talked to Mr. Lanham in the office was at the time the clearance card was presented. Did you mean by that that was the only time you saw him up there in that cage and talked to him, or had you talked to him before?

A. No, I talked to him before when I came in with my due book.

Q. At the time you presented the clearance card was that the first time you were physically present in the office or not?

A. The first time I had been able to get hold of Mr. Lanham.

Q. In other words, you mean inside the door or outside the door, or at that cage, what do you mean?

A. I found him, I seen him go across the street, and we come over to the office, and then I goes into the office as he goes in and he takes the clearance card. He said, "You know I have got to accept your clearance card."

Q. All right, the first time you saw him and you presented the due book?

A. The due book, yes.

Q. And where was that?

A. That was at the hall at this little window.

[fol. 88] Q. At the window, all right.

A. Yes, sir.

Q. Now Mr. Wells has asked you about your testimony, and the deposition, concerning John Galvin, and that you said there that you didn't have any kick. I will hand you your deposition and ask you if you will remember or recall the testimony that you gave also at that same time, the same deposition, concerning Mr. Galvin, beginning at page 99.

Mr. Wells: To which we object, he is cross examining his own witness and leading his own witness and the witness has entirely independently testified to this jury on this proceeding, that he did not have any kick against Mr. Galvin.

The Court: I will let him offer it in evidence. Overruled.

Mr. Smith: Begin reading on page 99 of the deposition at line 21, the question and answer, if you will identify them, just read it out loud to the jury.

A. (reading) "What I am trying to see is if you had it in for John Galvin or if you got your temper up after that, tell me about it, what happened." "I do not"—

Q. Identify the answer.

A. Now this is the answer: "I do not recall having any hard words with John Galvin." All right, and this is Question, "As a matter of fact, you had very friendly relations [fol. 89] with him." Answer: "I would not call it too friendly; I respect him as business manager and he respected me as a journeyman plumber; however, I think that there were times when he could have put me to work when I did not get it." Question again: "Did you ever tell him about it?" Answer: "If you mean job work, I imagine that I did, I recall one particular job that I would have liked to have had, that was over here at the school, teaching; I think that Mr. Galvin was the cause of me not getting that steady job."

By Mr. Smith:

Q. Do you recall that that was your testimony at that time?

A. Yes, sir, that was the lead school of teaching the apprentice boys to wipe lead.

Q. Did you ever mention to Mr. Galvin about this Republic Bank job?

A. I did.

Q. Did he ever put you on that job?

A. He did not.

Q. Did you ever complain to him about that?

A. I didn't try to have a fuss with him, I just asked him why couldn't I go on the bank job, the answer he always give me, "They are not calling for no men."

Q. Now Mr. Borden, in response to questions by counsel representing United Association here, when he was asking [fol. 90] you about who you had told about your complaints, you mentioned that you appeared before the executive board of Local Union 100; now will you tell us when you appeared before that executive board?

Mr. Wells: Pardon me just a moment, if the Court please, I don't believe there has been any testimony about an appearance before the executive board; the witness testified he talked to the chairman of the executive board and then he identified the chairman as chairman of Local 100, but we did not go into any matter with respect to a meeting with the executive board, nor did Mr. O'Donoghue.

Mr. Smith: It is my understanding they did, Judge.

A. It was later, it was later when I went before the executive board.

Q. I will now ask you did you appear before the executive board of Local Union 100?

A. I did.

Q. And at the time that you appeared before that board, had you received an invitation to appear before them or did you appear before them voluntarily on your own?

A. I was subpoenaed to come before them.

Q. All right. Now who subpoenaed you to come before that executive board?

A. John Galvin and Jeff Mullally, came out to the job at Texas Plumbing Company where I was wiping lead there, [fol. 91] and told me to come before the board; Jeff Mullally said, "Baldy", he said,—he called me Baldy—"What are you suing the local for?" that was after they got a letter that I was suing them, and I said, "I am suing them, Jeff, for a year's work and discrimination." "Well, do you think

you have got a suit?" and I said, "Well, I think so", and Jeff said, "Well, I am not going to interfere."

Q. Now, Mr. Borden, did you appear before the executive board of Local Union 100?

A. I did.

Q. And when was that that you appeared before that board?

A. The best I can figure it, it was around the 18th of October.

Mr. Wells: Of what year, please?

A. '54.

By Mr. Smith:

Q. What occurred at that meeting?

A. Well, they ripped me up and down, they crossed me this way and that way, and they bemeaned me and told me if I didn't hush up beefing, they could take my card away from me and throw me out of the union and could kick me plumb out of Dallas, and if I didn't like the way I was getting along, they would do it, the best I could do is drop the case and get out of Dallas. I told them I wasn't going to drop nothing. I didn't go back around because I was [fol. 92] afraid to, I was afraid I was going to get bodily hurt, to be honest with you.

Q. Did you go back around the union hall after that?

A. I made it kind of scattering, I made it kind of scattering, only paying dues; I didn't fool around there long, I was actually scared and I am still scared of them.

Q. All right, Mr. Borden, you have testified that you went to work on the Texas Plumbing Company job sometime around August of 1953. Can you fix the date any more clearly than that as to whether it was the first part or latter part of August or do you have any definite recollection on that point?

A. Well, I believe it was around the 10th or something of August, because my birthday is the 14th and when I had my birthday, I was on the job for my birthday. I don't know just how long I had been on it at that time, but I figured it was around there close at the time I started work

on it, it was raining and quite a bit of layoff and quite a bit of trouble working.

The Court: What year are you talking about now?

Mr. Smith: We are talking about 1954, Your Honor. This is the fourth job he testified he worked on.

The Court: All right.

A. I didn't make steady time because it rained quite a bit, it was on and off, on and off, until we got up to where [fol. 93] it could be in the dry.

Q. All right, now this job you say was of a nature that when it rained, you could not work on the job?

A. That is right, until they got the frames of the houses up to where you could get inside, when they would lay off one, we had to all lay off.

Q. And did you have quite a bit of rain during August and September of that year, or was it later on?

A. Well, it was quite a bit of it there, we were off quite a bit of time there on account of rain.

Q. Now in this suit, you are asking for damages from the period of September 15, 1953, to September 15, 1954?

A. That is right.

Q. And you have testified that on this Texas Plumbing Company job you worked during the period from August until what date was it?

A. I would say it might have been the first week in August or something like that, I was there on my birthday, the 14th.

Q. From then until when did you lay off that job?

A. I quit it and went to work the first day of November, to the Dallas Independent School Board.

Q. In other words, you worked there until approximately the first day of November?

[fol. 94] A. I would say a week before the first, or something like that.

Q. A week before the first; all right, since you are suing for damages from September 15, 1953, to September 15, 1954, you earned $602.25, with the Texas Plumbing Company?

A. That is right.

Q. During the period between August and November.

Now to cut off the amount that you had earned prior to September 15, 1954, can you give us any approximation as to how much of this sum of $602.25 you had earned prior to that time?

Mr. Wells: Now, if the Court please, we object to some approximation or speculation or guess about an important matter as an itemization of damages, there are records available that will show when he went to work and what he earned.

Q. I am asking the witness to give his best recollection.

The Court: I will let him answer.

A. Now let me get that clearly, Mr. Smith, I don't believe I get just what you mean there, can you give it to me again?

Q. I want you to give to the best of your knowledge and your recollection the amount of money you earned with [fol. 95] Texas Plumbing Company between the time you started to work on that job and September 15, 1954?

A. Well, I still don't understand, I don't believe, what you want cut off of that, there is what I made.

Q. This covers the period from August to November?

A. That is right.

Q. Now I want you to tell the jury your best recollection of the amount of money that you earned between the time you began that job and September 15, 1954? In other words, just part of that period of time that you worked for Texas Plumbing Company?

A. Oh. Well, it wouldn't look like it would be over, much over five weeks, if it had been steady through, wouldn't have been pay over that much, five weeks in all over that period of time.

Q. Well, now you were there and it was raining part of the time?

A. That is right, we were off quite a bit for the rain.

Q. And I want you to estimate how much money you earned between that period of time?

Mr. Wells: The same objection, Judge.

The Court: Overruled.

A. I would say half of that.

Q. Approximately half of that?

[fol. 96] A. Yes.

Q. That would be approximately $300?

A. I would say something like that.

Q. That you earned between August to September 15, 1954?

A. Yes, that would be—

Q. Is that your best recollection of the amount of money that you earned during that period of time?

A. Yes, sir, it would be the best I could figure it out, yes, sir.

Mr. Smith: I have no further questions at this time.

Recross examination.

By Mr. Wells:

Q. Mr. Borden, on what basis do you cut off your damage period at September 15, '54, what happened then?

A. That was a year from the time I first come in here, the best I can figure.

Q. You are asking this jury to give you damages, and I would like for you to tell them on what basis you bring it up to a particular date, on the basis that you came in here a year before that, is that right?

A. Well, that is what I said in the suit, I was suing for a year's pay for damage, I was suing for a year's pay in [fol. 97] damage, a year's pay, and that would be from the 15th of September when I first come in here until the 15th of '54, and I was trying to figure up what I made, what I got out of the local during that length of time.

Q. I believe we have already established that you worked at Spencer Plumbing until about December 17th, just before Christmas, and then I believe you said you were off a couple of weeks, until you worked at that next place, is that right?

A. Well, I told you I didn't have any specific dates.

Q. It was around two weeks?

A. It would be guessing at it.

Q. So that would put you to work back again in January of '54, is that right?

A. I suppose it would.

Q. And where was it you worked after Spencer?

A. After Spencer I went to Keiffer.

Q. To Keiffer and worked there until you were laid off and you were off again you said about two weeks?

A. I suppose so, or something like that, I can't remember just those dates, man, that has been too far.

Q. And then you came to work for Rose, and you worked there until—I believe you first said about March, as your counsel suggested, and then you changed it and said it was more like April or May?

[fol. 98] A. That is right.

Q. And as I understand you, you were idle from May until sometime in August?

A. That is right.

Q. And you went to work on this housing project before your birthday in August?

A. I am sure, I was on the job when my birthday came.

Q. And your birthday is August 14th?

A. The 14th.

Q. So it must have been early August that you worked there?

A. I am sure it was.

Q. So you were off of work roughly from April or May until early August, is that right?

A. Just whatever it shows up there, I am guessing at those dates, I don't remember.

Q. Now the previous summer you had been off from either April or June until September, had you not?

A. I don't recall working anywhere outside of—

Q. I believe you told me that before, though, when you were in Galveston, or Shreveport; now the summer before that, can you remember what you did?

A. The summer before what?

Q. That would be the summer of 1952?

A. I think I was at Galveston, I was at Galveston work-

[fol. 99] ing, I am pretty sure.

Q. Working or enjoying life?

Mr. Smith: Your Honor, we object to this line of questions, it has no relevancy and no purpose to be served.

The Court: I will let him answer.

A. Well, I am sure I was working in Galveston in '52.

Q. Now I am talking about the time from May until August of '52, are you telling this jury you were working then?

A. From May until August of '52?

Q. Yes.

A. I am not telling the jury I was working at any time in there, you ask me these questions.

Q. How about from May to August of '51, were you working?

A. That is too far back, that has nothing to do with this, I don't remember what I was doing then, I might have been fishing.

Q. All right, that is fine, thank you very much.

Recross examination.

By Mr. O'Donoghue:

Q. Mr. Borden, Mr. Mullally you say came out to the job site where you were working October of 1954, is that [fol. 100] correct?

A. That is correct.

Q. Now when he arrived at the job site, he told you that the International had had a complaint, a letter from a lawyer, setting forth a complaint of yours against the local union, is that not correct?

A. I don't remember him telling me that International had a letter, no.

Q. Well, did he say to you that he had had a complaint?

A. He asked me what I was suing the local for, and I told him a year's work.

Q. Now didn't you also tell him that the local union—that you were going to file suit?

A. I didn't tell him, because they had done got the letter from the lawyer, I had done filed it, that was when I got action, was after I filed it, that is when I got action.

Q. You had already filed your suit at that time?

A. Yes, sir.

Q. Well, didn't Mr. Mullally tell you, after you told him you had filed suit, that he couldn't give you any advice?

A. He said I am not going to interfere.

Q. In other words, Mr. Mullally didn't approve or affirm what the local union had done, he took a 'hands off' [fol. 101] attitude?

A. The words he told me, he said, "Baldy, what are you suing for?" and I said, "A year's work, Jeff, and discrimination", and he said, "Well, do you think you have got a suit?" and I said, "I think so and the lawyer thinks so." And he said, "Well, I am not going to interfere." John Galvin give me an envelope, I believe he gave me an envelope with a citation to be at the executive board and they left the job and that was it. That was the first results I got, was after the lawyer come in.

Mr. O'Donoghue: No further questions.

Redirect examination.

By Mr. Smith:

Q. I just have one question. Mr. Borden, you stated that you wouldn't have had to file this suit in Louisiana except for this suit, would you explain that statement to the Court?

A. I certainly can, be glad to explain it to the jury.

Q. Please do so.

A. That is my wife's home, I have known Brady for years. He was a young man; I have knowed him since he has been there, we own a place down there in that jurisdiction, within a mile of where she was born. She wanted to move down there; well, at that time we had a little money [fol. 102] and we could have halfway retired. All right, there was some good work going on around Monroe, in fact, it was right there at Ruston and the men that were on the job were friends of mine, just like the friends I have been working with for years. All right. I goes over to the local union at Monroe, myself and my wife and two of her cousins, and talked to Pat Brady. He said, "Borden, go on and move down here", and said, "I will be glad to have you a-plumbing I know, go on and move down on the place and fix it up." All right, there is big—there is

Ruston-Tex College and there was a big building coming out of the ground, a friend of mine was on it, and he said, "Have you ever run a duriron?" and I said, "I have run plenty of them," duriron, there is a lot of plumbers that don't know what that is. I said, "I have run plenty of them", and he said, "I want you"; and I said, "Well, I have just got moved down here, and Pat told me I could go to work, he said just leave your card in Shreveport and just come on and bring your due book over here and go to work". That is the usual procedure they like. They like adobe, you know, if you know what adobe means, jury; it's pay to work, so I goes over there and tells Pat I am ready to go to work, and he said, "Okay, where can I get hold of you over the telephone?" and I gave him the telephone number of my wife's cousin's barbershop up at a little place called Sugert, about a couple of miles from [fol. 103] where we lived. All right, he didn't call, and finally I went back over to see Pat and he said, "Well", he said, "I have changed my mind on you," and I know what had happened. I will tell you later down the line. He said, "I have got news for you, you are not going to work." I said, "Why didn't you tell me that before I went to the expense of moving down here and straightening up here?" "Well," he said, "things don't always stay the same." Well, I know this gossip from the convention they had had, this suit here, had got in connection with them. I goes back home and tell my wife, and said, "Well, it is just like it is everywhere else."

Mr. Wells: Your Honor, I have tried to be lenient about these objections, but I think a conversation between the man and his wife—

The Court: Sustain it.

A. That would lead up to something.

The Court: Sustain the objection.

Mr. Smith: No further questions.

Mr. Wells: That is all.

The Court: Stand aside, and members of the jury, bear in mind the instructions heretofore given you and be back at 1:30. We will recess until 1:30.

(Reporter's Note: Court reconvened at 1:39 p.m., July 19, 1960, at which time the following proceedings were had in the presence and hearing of the jury:)

[fol. 104] The Court: All right, call your next witness.

Mr. Smith: I would like to call as our next witness Mr. A. G. Thurman. Your Honor, if we did not do it earlier, we would like for the record to show that we introduce Plaintiff's Exhibits 1 through 5 into evidence at this time.

Mr. Wells: No objection, and I make the same proffer with respect to Defendants' Exhibits 1 and 2.

The Court: Did he object?

Mr. Wells: That is right, 1, 2 and 3.

The Court: Are those admitted without objection?

Mr. Smith: Yes, Your Honor.

The Court: His 1, 2 and 3, and your 1 through 5.

Mr. Smith: Yes, sir.

The Court: All right. Proceed.

A. G. THURMAN, after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Smith:

Q. Please state your name and address, sir?

A. A. G. Thurman, 2908 50th Street, Dallas.

[fol. 105] Q. Mr. Thurman, how are you employed?

A. As Field Superintendent for mechanical contractors.

Q. And who are you currently working for?

A. Burden Brothers.

Q. Is that a plumbing corporation?

A. Right.

Q. Are you a member of any union, Mr. Thurman?

A. I am.

Q. Of what union are you a member?

A. Local 100.

Q. Are you a member of any larger International union?

A. No, sir, other than the—well, no, I would say no.

Q. Are you a member of the United Association?

A. Affiliated with the United, yes.

Q. Are you a member of both of the defendants in this case?

A. I beg your pardon?

Q. Are you a member of both defendants in this case, Local Union 100 and United Association?

A. Yes.

Q. Mr. Thurman, how long have you been in the plumbing business?

A. Since 1919.

Q. Now Mr. Thurman, did you have any official connec-
[fol. 106] tion with the Republic National Bank job?

A. I was foreman on parts of the work.

Q. And who were you working for on that project?

A. Farwell Company.

Q. And what was your position with Farwell Company on the Republic National Bank job?

A. Foreman.

Q. All right, sir, now, when did you go to work on that job for Farwell Construction Company?

A. The dates I couldn't tell you, that is too far back for an old man's memory, I just couldn't tell you exactly when I went to work for them.

Q. Do you have any idea, was it '52 or '53?

A. Well, it was in '53 when I went on the bank, I am sure of that.

Q. Can you tell us the time of year that it was, whether it was autumn or fall or summer?

A. It was beginning of summer.

Q. Beginning of summer. Now what was the status of the job at the time you went on it?

A. It was partially roughed in, to the seventh floor.

Q. And when you began work on the job, were you in the capacity as a foreman?

A. No.

Q. What was your capacity at that time?

[fol. 107] A. Journeyman.

Q. When did you become foreman on that job?

A. Approximately a week after I went to work on that particular job.

Q. Now how many plumbers did you have working under you at the time you became foreman?

A. Well, I don't remember exactly.

Mr. Wells: Pardon me, please, just a moment, may I approach the bench?

The Court: Yes, sir.

Mr. Wells: We object to any testimony from this witness with respect to the establishment of any agency relationship between him and Farwell or with respect to establishing the alleged scope of any agency relationship on the ground that it is improper for an alleged agent to establish either fact of agency or the alleged scope of the agency. These matters are not matters competent to be established by an alleged agent but must be established by other evidence other than the evidence of an alleged agent.

Mr. Smith: Your Honor, it is our position that the objection that counsel raises has no bearing at all to the question propounded to the witness.

The Court: What are you seeking to elicit?

Mr. Smith: And is not proper—well, there are several things we will be seeking, Your Honor, and he may have [fol. 108] a valid objection, but we don't think he will have at any time.

The Court: What is your last question about, whether he was foreman?

Mr. Smith: I asked him about how many plumbers he had working under him as a foreman on the job; he has already testified that he was foreman on the job.

Mr. Klein: In any event, Your Honor, an agent can testify as to his own agency and as to the authority which he has. The only time the agency cannot be determined by the testimony of the agent is where the agent is not present to testify. This man is present to testify and is in fact testifying.

Mr. Wells: We are saying that no predicate is laid at this point in the record with respect to the alleged agency or scope of agency other than whatever testimony would be coming from the mouth of this witness, sought to be established as an agent, and we say that therefore, there is no predicate properly laid.

The Court: Overruled.
Mr. Wells: Note our exception.

By Mr. Smith:

Q. Now Mr. Thurman, the question was, how many plumbers did you have working under you on that job at the time you became foreman?

A. I don't remember exactly, it would be between five [fol. 109] and ten.

Q. Were there any periods of time during the time you were foreman on the job when you had trouble obtaining plumbers for the job?

A. Well, I wouldn't exactly say trouble, possibly I would have to wait a day or two from the time I called for a plumber.

Q. How would you hire men on this job, Mr. Thurman?

A. Called the local, the business agent of Local 100.

Q. And who placed the call for men who worked under you?

A. I did.

Q. And did you do this during the entire time you were foreman on the job?

A. Well, not at all times, I might and it is very possible that I told our superintendent that I needed more plumbers, and it is possible that he called sometimes.

Q. But you also placed calls—

Mr. Wells: I object to his leading the witness.
The Court: Don't lead him, counsel.
Mr. Smith: He has already testified to that, Your Honor.

By Mr. Smith:

Q. Did you say the superintendent did place some calls?

A. I feel sure that he did, I can't recall any particular [fol. 110] time but there are times when you are on the job when you are doing something else, when you pass it on to the superintendent.

Q. Did you ever place any calls to Local Union 100?

A. Yes.

Q. Who hired most of the men under you, Mr. Thurman,

during the time you were foreman, did you, directly, or did someone else do it?

A. I did mostly.

Q. And did you say you placed this call with the local union?

A. Right.

Q. Who would you talk to at the local union?

A. I would either talk to the business agent or the business manager.

Q. And who was the business agent and who was the business manager of Local 100 during 1953?

A. Cleo Lanham was business manager, Mr. Zuefeldt was the business agent.

Q. And you placed your calls directly with them, is that correct, or did you place them with someone else?

A. It is possible I might have talked to the secretary at some time and told them my needs, that is possible.

Q. All right, sir, after you placed a call, what would be the procedure then in getting a man on the job?

[fol. 111] A. That is entirely up to someone in Local 100; that is the end of my obligation in getting a man on the job.

Q. Did thereafter Local Union 100 send a man out?

A. Yes.

Q. And did they have any evidence that they were the proper person sent out by Local Union 100 at the time they reported to you?

A. We have a referral, which is a piece of paper introducing the plumber as a journeyman.

Q. All right, sir, now, do you know Mr. H. N. Borden, the man sitting here at my left?

A. I do.

Q. During the time that you were foreman on this job, did you ever talk to Mr. Borden?

A. I did.

Q. When was it and where were you at the time you talked to Mr. Borden?

A. When it was, I couldn't give you any dates, where I was, I was on the Republic Bank job.

Q. And how did you communicate with Mr. Borden at that time?

A. He called me.

Q. All right. You cannot pin this to any month, as I understand you, is that correct?

A. No, I cannot.

[fol. 112] Q. All right, sir, now what did you say to him and what did he say to you at that time?

Mr. Wells: Object to any conversation between this witness and the plaintiff outside the hearing and presence of the defendants in the case as hearsay.

Mr. Smith: Your Honor, the witness has already stated that he is a member of Local Union 100 and International, and counsel for defendant entered a stipulation at the beginning of the trial that all members of Local Union 100 and International—

The Court: There was no stipulation, counsel.

Mr. Klein: Your Honor, further, the witness has said—

The Court: I understand perfectly. Let me cogitate here—overruled.

Mr. Wells: Note our exception.

By Mr. Smith:

Q. Now, sir, if you will just state what was said by you and what was said by Mr. Borden at that time?

A. The first conversation?

Q. Yes, sir.

A. Mr. Borden called me and told me he was here in town and wanted to know if I had a place I could use him, and I said, "Yes, if you get a referral, come on down."

Q. All right, sir, now what did you do after you talked [fol. 113] to Mr. Borden?

A. I don't get the question exactly, I didn't do anything, I mean, I—

Q. Did you talk to anyone at Local Union 100 concerning Mr. Borden after that?

A. No, sir, not—do you mean, let me get your question clear, please?

Q. Did you talk to anyone at Local Union 100?

A. That day or a month after?

Q. That day or the day after concerning Mr. Borden?

A. Oh, yes, after that, yes.

Q. All right, sir, who did you talk to and when was it?

A. It was some week or ten days, possibly two weeks later that I talked to Mr. Borden.

Q. No, sir, the question is, when did you talk to someone at Local Union 100 concerning Mr. Borden, after this telephone call, and who did you talk to?

A. It was approximately a week or ten days, I couldn't say exactly when, Mr. Borden had called me later than this first call, and said that he failed to get a referral, but he had his travel card in here now and wanted to know if I still had a place for him, and I said, "Yes, if you will get a referral", and he said, "Will you place a call for me?" and I said I would.

[fol. 114] Q. Had you placed a call for Mr. Borden prior to that time or not?

A. No, sir, not prior to this time.

Q. All right, sir, now on that second occasion, did you or did you not place a call for Mr. Borden?

A. I did.

Q. And who did you place that call with?

A. I just called the union, but I talked to Cleo Lanham.

Q. And please tell us what you said to Mr. Lanham and what he said to you at that time?

A. I asked Mr. Lanham if he had an H. N. Borden there and he said that he did, and I said, "Well, if you give him a referral, send him down to this bank." Now, do I have to—Your Honor, do I have to say exactly what was said, or could I skip—

The Court: Yes, sir, you are supposed to, yes.

A. He said, "I am not about to send that old son-of-a-bitch down there, he shoved his card down our throat and I am not about to send him to the bank." Pardon me.

Q. All right, now you had placed a call at that time and that conversation took place at that time?

A. That is correct.

Q. And Cleo Lanham was business manager of Local 100 at that time?

[fol. 115] A. That is correct.

Q. Did you have any subsequent conversation with Mr. Borden concerning your placing the call for him?

A. What do you mean, subsequent, later?

Q. After that time.

A. You have to talk plain English to me.

Q. It is hard for lawyers to do.

A. Yes, Mr. Borden came down on the bank job and asked why I hadn't called him, and I said I did, and he said, "Well, they said out there that you didn't call me", and I said, "Well, I certainly did", and he said, "What did they say?" and I was foolish enough to tell him what they said.

Q. And did you thereafter talk to Mr. Lanham concerning Mr. Borden?

A. No, sir.

Q. Have you talked to anyone else of Local Union 100 at that time about Mr. Borden?

A. No, sir.

Q. Did you talk to Mr. Mullally concerning Mr. Borden?

A. No, sir.

Q. Now, Mr. Thurman, can you tell us when the Republic National Bank job was completed?

A. No, sir, I couldn't tell you exactly when the job was completed, the fact is, I wasn't there when it was com-
[fol. 116] pleted.

Q. When did you leave that job?

A. I left there right after Christmas of 1954.

Q. All right, during that period of time had work been continuous on the bank job?

A. Yes, sir.

Q. At the time you were foreman?

A. Yes, sir.

Q. If it rained would that affect the work of the plumbers under you on that job?

A. No, sir.

Q. In other words, the job was covered and it did not affect them, is that correct?

A. That is correct.

Q. Mr. Thurman, did you know Mr. Borden prior to the time he first called you?

A. I did.

Q. How long had you known Mr. Borden, Mr. Thurman?

A. I had known him approximately a year before he came to Dallas.

Q. Where did you meet Mr. Borden?

A. In Galveston.

Q. What was the occasion of your meeting Mr. Borden in Galveston?

A. We were both working on the same job.

[fol. 117] Q. At that time did you have occasion to observe Mr. Borden's work?

A. Well, yes, I would say I did, as one workman to another.

Q. Did you consider his work to be good work or bad work or indifferent work?

A. Well, I would say his work is normally what we would class as good work.

Q. Did you want him to work for you on the Republic National Bank job?

A. Well, I don't know, if you would say, I hardly know how to answer that, if you want to know if I sent for him and particularly him and nobody else, I couldn't say yes, I needed a plumber, and I figured Mr. Borden would do the job and could do the job.

Q. You knew him and felt he would be competent to do the job or not?

A. I did.

Q. Mr. Thurman, assuming that Mr. Borden was hired on the Republic National Bank job, was there sufficient work there for Mr. Borden to work continuously during the period from the time the call was placed until the time you left?

Mr. Wells: Pardon me, please, sir, that calls for a conclusion of the witness, and it is speculative, if Your Honor, please, and we object on those grounds.

[fol. 118] Mr. Smith: Your Honor—

The Court: Sustain the objection, it starts out with an assumption, that part of it is objectionable.

By Mr. Smith:

Q. I will rephrase the question to you, Mr. Thurman, was there sufficient work on the Republic National Bank

job from the time you placed the call to Mr. Borden until the time you left the job, to keep him busy?

Mr. Wells: The same objection, if the Court please.
The Court: Overruled.

By Mr. Smith:

Q. Answer the question, sir.
A. I beg your pardon?
Q. Would you answer the question?
A. It gets me confused when they start that.
Q. Please answer the question.
A. Please ask the question.

Mr. Smith: Will the reporter read the question back, please?

The Court: Oh, from the time you started to work on the Republic Bank job until you left, was there sufficient work there to keep Mr. Borden busy?

A. There was.

The Court: That is substantially the question.
Mr. Smith: No further questions.
[fol. 119] Mr. Wells: May I approach the bench?
The Court: Yes, sir.

Mr. Wells: If the Court please, I move at this time to strike all of the testimony of the witness, Thurman, with respect to his alleged agency relationship with Farwell and with respect to his authority to hire, with respect to his alleged authority to hire, or with respect to the scope of his authority in any respect for the reason that it is not proper for an alleged agent to be permitted to establish either the fact of agency or the scope of the authorization.

The Court: Overrule it.

Mr. O'Donoghue: Your Honor, I would like for the record to show that this objection of Mr. Wells, at least since our colloquy of this morning is for both of the defendants.

The Court: Well, I think that was so understood, that is, there have been some objections, I think he represents both, he said the defendant, and then he wanted the record

to show it applied to both, and I said from here on out, it would be so understood.

Mr. Wells: Thank you, Your Honor, and that is without prejudice to our contention that counsel for both—it was on behalf of both.

The Court: Yes, sir.

Mr. Wells: And the exceptions. Thank you, Your Honor.

[fol. 120] Cross examination.

By Mr. Wells:

Q. Mr. Thurman, I take it you are not very clear on some of these dates of six or seven years ago?

A. Not at all.

Q. Well, I would like for you to do your very best to give us the sequence of events, even if you can't give us the exact dates.

A. Surely, I will be glad to.

Q. If I understood you, the only call that you made to the local union was after you had been told by Mr. Borden that he had already deposited his traveler?

A. That is correct.

Q. And you did not make any call for him at whatever—well, let me back up?

Q. Were you in the courtroom this morning?

Q. You heard Mr. Borden's testimony this morning?

A. Yes, sir.

Q. You heard the testimony about a matter a few days or a few weeks in which he was here before he went back for what he called the "boss" or the traveler?

A. Yes.

Q. And then he testified he came back here to Dallas [fol. 121] with his travel card?

A. That is right, I heard it.

Q. And your conversation with the local union was after he had come back to Dallas and deposited his travel card?

A. That is correct.

Q. Are you able to tell us whether it was the day he deposited the traveler or a week later or two weeks later or when?

A. No, I could not tell you that because I wasn't there. I can only tell you, I called the day he called me and told me that he had put his card in, but when he put his card in, I wouldn't know.

Q. I see. Have you got any record or any way you can help this jury establish this date, that might be very significant?

A. No, sir, I am sorry, I sure don't; if I could get out of this spot I am on, I would be glad to do that, too.

Q. Well, you don't feel that I am pressing you here, Mr. Thurman?

A. No, no; oh, no.

Q. I just want you to answer the questions and tell us the facts here.

A. Well, that is the only thing I am going to tell you, [fol. 122] I tell you for sure.

Q. Now from what point did you make this call to Mr. Lanham?

A. You mean what time of day or what place?

Q. No, I say from what point?

A. From the bank job.

Q. Did Farwell have a telephone on that job?

A. Correct, yes.

Q. Where was that telephone?

A. Well, they had, I believe three or four telephones; they had different offices—

Q. Well, are you able—

A. All in one building.

Q. Are you able to project yourself at this time back to that skeleton of the bank building and put yourself sitting in front of the telephone somewhere?

A. Yes, sir, I can tell you exactly where I used the telephone, in the planning room.

Q. In the planning room?

A. Right.

Q. And was there anyone else in there?

A. That I couldn't tell you, there was usually someone in or out or somebody might have been in, I couldn't tell you about that.

Q. Now who would normally be in the plan room?

[fol. 123] A. Well, any of the foremans, or any of the draftsmen or the superintendent, which would just about cover the business of the plans.

Q. Did anybody have a regular place of business in that room that would be there all the while?

A. Not in that particular room, no, sir.

Q. What was your particular job at that time?

A. I had charge of running the soil pipe.

Q. At any particular levels or floors?

A. No.

Q. Or all over the whole job?

A. All over the whole job.

Q. Actually, Farwell had the mechanical contract, so-called, on that job, didn't they?

A. That is right.

Q. And that included both plumbing and heating and air conditioning?

A. That is correct.

Q. And that required the employment of among others, plumbers, pipe fitters and welders, is that right?

A. And sheetmetal people.

Q. All right, sir. Did you have anything to do with the pipe fitters?

A. No, sir.

Q. Your work was solely with the plumbers?

[fol. 124] A. That is correct.

Q. And limited to the installation of soil pipe?

A. Not necessarily limited to it, before I left there I had charge of running water pipe.

Q. I am directing your attention now to the time when—

A. That is right, strictly soil pipe.

Q. All right, sir, now how many people were working on the soil pipe then?

A. That I couldn't answer, because at times there were two different crews, I would say there would be anywhere from 10 to 20.

Q. Do you have any idea whether there were 10 or 20 at that point?

A. No, I don't, I know that I didn't have 10 men or I wouldn't have called for anyone else, because 10 men is all one man can properly handle.

Q. Well, if you had nine or eight or seven, or do you know?

A. I don't know.

Q. Did you know Jack Heath?

A. Yes, sir, very well.

Q. What job did he have on that?

A. He was general superintendent.

Q. He did the hiring on the job, did he not?

[fol. 125] A. Not necessarily, he hired the foremans, or set men up as foremans, but the foremans hired their own men as they saw fit.

Q. Now who did you hire on that job, I am talking about you, personally?

A. Well, I know, but I couldn't tell you that, because I called the local to send me a plumber.

Q. Can you give us the name of a single man you hired on that job?

A. I can see their faces but I don't remember their names that far back, no, sir.

Q. You can't give us the names of a single one or describe them, or where any of them are working now?

A. Well, let me put it this way, I don't hire men direct on a job like that, I call the business agent or somebody at the local and ask them to send me a plumber.

Q. That is the best answer you can give me to that last question?

A. I believe it is.

Q. What time of day was it that you called Mr. Lanham?

A. If I remember right, it was around 10:00 o'clock and I think I pretty well remember that.

Q. In the morning or evening?

A. In the morning, it wouldn't be in the evening.

Q. Well, you said you had two shifts on there some, did [fol. 126] you do some night work?

A. No, and you misunderstood me saying I had two shifts.

Q. I am sorry. You said two crews, I guess it was.

A. Right.

Q. Thank you, sir. Those were all on the same shift, is that it?

A. That is correct, that would be two different foremans, I wouldn't have but ten men, not over ten men.

Q. Now, what fluctuation was there in numbers of Farwell employees on that job?

A. Percentage-wise?

Q. No, number-wise, say, did it get as low as ten or fifteen men, and up to two or three hundred, or what—

A. It would get up to, I would say a couple of hundred men.

Q. All right.

A. Of course, that many men—

Q. And what would be the smallest size crew?

A. Well, that I couldn't answer because we are on different floors, it would be impossible for me to tell you that, there were 36 floors and they would have men working from the fourth basement to the top, and I only had operations in one place at a time.

Q. And you had a crew of ten men at the most?

[fol. 127] A. Right.

Q. Well, did your crews fluctuate from time to time?

A. Yes, sir.

Q. You would lay off men as you would get caught up and then hire men back again as you had to catch up, is that right?

A. That is right.

Q. Was that true all the while you were there?

A. Yes, sir.

Q. Is it somewhat the nature of building construction work that where the various crafts have to integrate their work with each other that sometimes electricians will get in the way of the ironworkers, or somebody, and you will have to lay people off for a week or two and then hire people back again?

A. That is true, and I may be out of line saying this, but you do get some men that you just can't use, and you have got to shift around once in a while and get some men that wants to work and not just be on the payroll.

Q. Now did you maintain a payroll record?

A. No, sir.

Q. Do you know whether the crew of men you had on the

day you called Mr. Lanham, how long that particular crew stayed with you?

A. There was some of the crew there that started when [fol. 128] I did and finished when I did.

Q. Now did Mr. Lanham send you somebody else in the place of Mr. Borden?

A. Now that I cannot answer, I know that I got men, I might have called over again for somebody or something, I can't answer that question.

Q. This jury is going to know what you might have done, but what we want to do is for this jury to have the facts about what you actually did do.

A. I understand.

Q. Did you call for somebody else when he said he wouldn't send Mr. Borden?

A. I didn't tell him at that time because that was the end of our conversation that I just repeated at that time.

Q. Well, what did you do?

A. I likely called again, possibly.

Q. Well, again, you are saying likely and possibly.

A. Well, I don't know. How do I know what happened seven years ago, I have seen a lot of water run under the bridge and over it, too, since that time.

Q. You know whether you went on working shorthanded.

A. I know I didn't work shorthanded very long at a time, I know that.

Q. And you just don't have any recollection about how [fol. 129] it was that you didn't work shorthanded?

A. That particular day, no, I am sorry.

Q. You don't think it would do any good to relax and scratch your head a little bit and think about it?

A. I am going to tell you just what I remember and no more, and I will tell you anything that I know that is the truth, but other than that I can't go, so far as getting mixed up, you can mix me up, but you can't get me to lie.

Q. Well, I am sure not trying to mix you up, Mr. Thurman.

A. Well.

Q. And if you think you are, well you just tell me when you want to slow down. I want the jury to hear the facts.

A. Well, when it comes to dates and stuff like that, I

don't believe that you can remember ten years ago just exactly what time of day it was, so I don't think it is fair at all to keep pressing me as to just exactly for the dates because I definitely don't remember.

Q. Now Mr. Thurman, I wasn't asking you about dates, I was asking you about whether you could help us at all—

A. Well, the time of day.

Q. —about whether or not you put in a call for somebody else when they wouldn't send you—

[fol. 130] A. Well, I said I am sure I did.

Q. Oh, now you are sure you did?

A. I didn't say that I definitely did, I thought that was about the same answer, because I didn't work shorthanded for any length of time.

Q. Now did you put that call in or did Mr. Heath or did somebody else?

A. Now who are you talking about, I mean, what call?

Q. Well, let's both of us relax and back off and start over.

A. All right. Okay. Okay.

Q. As I understood you, your testimony was that you were shorthanded?

A. That is right.

Q. And you therefore called for Mr. Borden?

A. That is correct.

Q. And Mr. Lanham told you he would not send Mr. Borden?

A. That is right.

Q. So if I understand you, that left you shorthanded?

A. That is right.

Q. All right, now what I am trying to find out in that set of facts is what you did to keep from being shorthanded?

A. Well, I have done answered that same thing again one time before, possibly not in the way you want it, I [fol. 131] don't know how you want it, but if I didn't call Mr. Lanham, I asked Mr. Heath to call Mr. Lanham, I will put it that way, somebody called for more men when we were short, whether it be me or Mr. Heath.

Q. What I am trying to find out is whether you can tell this jury that you have some recollection of that or whether you just figure out that it must have been that way?

A. I don't have a recollection exactly what happened; all I know, I told Mr. Lanham that that was his business, when he said he wasn't going to send the man, I said, "Well, fellow, that is your business", and I hung up.

Q. You didn't ask him to send anybody else at that time?

A. Not at that time, I didn't, no, sir.

Q. Now do you know what date Mr. Borden went to work for Spencer Plumbing Company?

A. No, sir, I didn't even know he worked for Spencer Plumbing Company.

Q. You don't know whether he was already employed at Spencer at the time you put this call in?

A. As I say, I didn't know until I heard his testimony that he ever worked for Spencer.

Q. Had you ever known Mr. Borden before Galveston?

A. No, known of him only.

Q. Known of him?

[fol. 132] A. Through the trades, yes, most of us old men is known by, well, you say through the grapevine, but personally, I didn't know him.

Q. All you knew about Mr. Borden is whatever the grapevine said about him?

A. That is right, exactly.

Q. Now you didn't have any authority in Galveston to hire him to come up here, did you?

A. No, sir.

Q. And you didn't hire him in Galveston to come up here?

A. No, sir, I couldn't because I didn't have the authority.

Q. Well, beyond that, you had a brother named Walter Thurman working down there?

A. That is correct.

Q. He was Mr. Borden's boss down there, was he not?

A. He was his boss, and also my boss.

Q. I suppose he would be in a better position to evaluate Mr. Borden's work down there in Galveston than you would be?

A. Possibly.

Q. Now if the record indicates that you went to work for Farwell on the Republic Bank job on August 13, 1953, would that be about right, I believe you said earlier you thought [fol. 133] it was early summer?

A. I did.

Q. I don't mean to confuse you about that.

A. Sure, I understand, I understand, but that record there, does that say that is where I went to work for—

Q. I will be frank with you, this is just my notes from a record, I don't have the record itself here.

A. Oh, I see, it was in the spring of the year, and I could tell you why, but that is immaterial so far as this case is concerned.

Q. You are sure it was the spring of the year?

A. Yes.

Q. Now how long did you remain a foreman?

A. Until I left Farwell Company, whatever date that was, it was in '54.

Q. Was there any time when you were bumped back from a foreman's job to a journeyman's job on that bank building?

A. No, sir.

Q. When you had a phone conversation with Mr. Borden, I believe he—did you have any phone conversations when you were on the job at Republic Bank Building job site, with Mr. Borden?

A. Yes, sir.

Q. Did you call him or did he call you?

A. He called me.

[fol. 134] Q. Did he say where he was calling from?

A. No, he didn't.

Q. Now did he call you the same day that you called Mr. Lanham?

A. He did.

Q. Was that what triggered your call to Mr. Lanham?

A. Well, now what do you mean by "triggered"?

Q. Well, perhaps triggered is the wrong word, again I am not trying to trick you at all.

A. Yeah.

Q. What I am trying to get at is what was it that caused you to call Lanham?

A. Well, there would be two things, I needed a man and he called me and told me he was available.

Q. And you say those two things happened just at the same time?

A. Well, an hour or so apart, and he called me, and I in turn called.

Q. Can you remember anything that happened on the job that drew it to your attention that you were a man short that day?

A. Well, I possibly knew I was a man short the day before.

Q. As I take it, your recollection is just so hazy that you can't explain why you didn't call the day before?

[fol. 135] A. Maybe I did.

Q. Do you recall whether you did or not?

A. No, there is a fluctuation there; you could understand my answers if you knew the business end of it, I mean as to how you operate. Maybe today I might not need over six men, I could use the ten if I had them, but I don't have to have them, and then there would be other days that it is necessary that you have all the men that you can handle.

Q. And as I take it, you just don't recollect what that circumstance was back there?

A. No, that is right.

Q. Had you and Mr. Borden been pretty good friends in Galveston?

A. Well, it would be like any two journeyman plumbers working together, we got on the job at 8:00 o'clock in the morning and we didn't have time to do anything except work; we worked in the same room, we conversed just like any two working men would, if that is the kind of question you want answered; I don't know just how you meant to ask that.

Q. I want the facts, Mr. Thurman.

A. Well, that is the facts; when the day was over, I went home and so far as I know, he went home. I know I did.

Q. Did you have any social contacts with him there?

[fol. 136] A. No, none whatsoever.

Q. Did you have any conversation with him about maybe both of you would come up here on the bank job?

A. No, no, it is possible that we talked.

Mr. Wells: Thank you, sir.

Mr. O'Donoghue: No questions.

Mr. Smith: No questions.

The Court: Just for curiosity, what is soil pipe, sewerage pipe?

A. That is cast iron, yes, sewer pipe.

The Court: All right, call your next witness.

Mr. Smith: At this time I would like to call Mr. Fred Zuefeldt. Mr. Zuefeldt is called as an adverse witness also, Your Honor.

The Court: Yes, sir.

Fred Zuefeldt, after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Smith:

Q. Would you please state your name and address?

A. Fred Zuefeldt.

Q. Your address?

[fol. 137] A. It is 2418 West Davis.

Q. Mr. Zuefeldt, what business are you in?

A. I am in the plumbing business.

Q. Do you own your own business now?

A. Yes, sir.

Q. Are you a member of any labor union?

A. Yes, sir.

Q. Will you tell us what union you are a member of?

A. Plumbers and Steam Fitters Local Union 100.

Q. Is that a member of any international organization?

A. Yes, sir.

Q. Which one?

A. That is a member of the United Plumbers and Steam Fitters, the local.

Q. In other words, you are a member of both defendants in this case?

A. Yes, sir.

Q. Mr. Zuefeldt, have you ever held any office in Local Union 100?

A. Yes, sir.

Q. What offices have you held in that union?

A. Office as business agent and office as business manager for a short while.

Q. All right, sir, if you will, please tell the jury who the business manager of the union is, so far as duties and [fol. 138] business agent?

A. You mean now, at the present time?

Q. No, sir—well, at the time, at the start of 1953, what were the duties of those two officers?

Mr. Wells: Now if the Court please, these are matters that are covered by printed constitution, which would be the best evidence. These have been furnished to counsel and we have no objection to their coming into evidence.

Mr. Smith: Your Honor, the question is—

The Court: I will let him answer, overrule it.

A. You want to know the duties of the business manager and business agent?

Q. Yes, of 1953?

A. In this local at that time they had a practice that the business manager was also the financial secretary and treasurer, and he was responsible for all the money received and paid out, and carried on the business in a business like way to provide work for the men and to do whatever duties that is to be done to assist his men in keeping work and negotiate contracts, give them a fair wage, as much, as far as he could, and if that's enough, why—the business agent, his job was to secure as much work as he could for the journeymen, to see that they did, or was eligible to do, and would do about what they were supposed [fol. 139] to do so far as he could and to settle—to help settle, if there would be any dispute over any work, and then there was other smaller things that he did toward, to aid or assist a sick man, or a man who was in some of his personal troubles and things like that, and to see—

Q. Now the business agent was under the business manager in the organization, was he not?

A. Well, no, not at that time, he was not, you wouldn't consider it under it, he wouldn't have to take orders from the business manager, he wasn't hired by the business manager, he was elected.

Q. Both officers were elected in 1953?

A. At that time, yes; I was elected the same as he was.

Q. All right, who did you consider to be your boss down there, was Cleo Lanham your boss?

A. The UA constitution was my boss.

Q. Did you take orders from Mr. Lanham?

A. Well, to a certain extent I did, I went along with him, to see what was there for me to do, whereby we didn't double ourselves, and I helped and assisted in every way I could to earn my money while I was there and for the benefit of the local and the members.

Q. Well, now, didn't you take orders from Mr. Lanham that you were not to accept any clearance cards in your [fol. 140] duties as an agent?

A. No, I didn't take orders from Mr. Lanham that I was not supposed to accept any clearance cards.

Q. Well, who gave you the orders that you were not to accept clearance cards?

A. It is written in the UA constitution that they were to be accepted only by the secretary of the local, I didn't have the authority to accept them.

Q. Did Mr. Lanham tell you at any time what you should do with out of town people who came in here with clearance cards, what procedure you should follow?

A. Yes, the procedure I was to follow was to refer them to him, he was the man who had the authority and power to take care of those people, I didn't.

Q. All right, sir, now the union at that time had an executive board, did it not?

A. Yes, sir.

Q. And what were basically the duties of this executive board?

Mr. Wells: If the Court please, I am going to interpose an objection with respect to this question and any other questions as to the duties and powers of any officer or agent of either of these unions because such matters are matters that are set forth in writing in the basic documents, either the constitution or the by-laws of the respective [fol. 141] organizations.

Mr. Smith: I withdraw the question—

Mr. Wells: Because the constitution and by-laws would be the best evidence, if Your Honor please.

Mr. Smith: I will rephrase the question.

Q. In Local 100, what duties did the executive board accept and what power did they exercise in 1953?

A. Well, they—

Mr. Wells: The same objection, if Your Honor please.

The Court: Overrule it.

Mr. Wells: Note our exception.

A. They handled any charges that would be made by one member to another or to an officer and more like a court, one man would make a complaint, or two men, or a dozen, whatever it was, and they would hear that case before the executive board and they would make a recommendation to the bodies as a rule as to how it would be disposed of and handled and charges, if any, and if so, how much. That is part of their duties. Other duties was to talk to them about wage negotiations, about working conditions, and they were always good about advising your secretary and treasurer or your business agent, they would give me advice, of course, for the benefit of the local members.

Q. Didn't they exercise full power over Local 100 be-
[fol. 142] tween meetings of the membership of the union?

Mr. Wells: That calls for the witness' conclusion, it is leading the witness.

The Court: I overrule it.

Mr. Wells: Note our exception.

By Mr. Smith:

Q. Would you answer the question, please, Mr. Zuefeldt?

A. I got lost just for a minute.

Q. The question was, didn't they exercise full power over the union between meetings of the general membership of the union?

A. Well, I have heard that related down there, but I hardly think they did, I thought there might be one member of the executive board maybe think he had an idea that would be good or maybe a recommendation to the business

manager or business agent, but at the same time, if it happened to be out of line, why he was by no means, it was compulsory for him to do it.

(Reporter marked an instrument as Plaintiff's Exhibit No. 6 for identification.)

Q. Mr. Zuefeldt, I hand you what has been marked as Plaintiff's Exhibit Number 6 which purports to be the constitution and by-laws and working rules of Local Union Number 100, and ask you if you have ever seen that document or one similar to it?

[fol. 143] A. Yes, sir.

Q. Will you tell us exactly what it is?

A. This is the Local 100's own working rules where they claim they have their local economy.

Q. And what is the date of those rules there?

A. These were made in September 18, 1950.

Q. Now that is the constitution of the local union, is it not?

A. Some of these rules I don't believe will comply with the constitution.

Q. You say they are the constitution of Local Union 100, are they not, sir?

A. So long as they don't conflict with the constitution of the United Association.

Q. I am not asking you that, sir, I am asking you if this document is not the constitution and by-laws and working rules of Local Union 100?

A. That is right, it says so here.

Q. Now is this the same constitution, by-laws and working rules which were in effect in 1953?

A. Yes, sir, unless there has been some changes made since, in which they had an opportunity to change any of those working rules, any time.

Mr. Smith: Excuse me just a moment, Your Honor.

(Reporter's Note: The attorneys confer outside the hear-
[fol. 144] ing of the Court Reporter and the jury, after which the following proceedings were had in the presence and hearing of the jury:)

By Mr. Smith:

Q. Do you know of any provisions in this constitution that were changed?

A. Well, right offhand, I don't, because I have been not active there for about four years, and I haven't read them, actually, I haven't.

Q. Now these don't purport to be the rules or the constitution of today and that was not the question. The question is do you know of any changes that were made in this constitution, by-laws and working rules?

A. I couldn't recall any changes that are made right offhand, I hadn't give it any thought.

Q. Where would any such changes be, Mr. Zuefeldt?

A. It would be made by the rules board, rules committee and would be, have to be read before the meeting at so many meetings and then it would have to be a certain time, period between this recommendation and election, and it would be voted on.

Q. Do they write this down, if they change a rule, do they write it down?

A. Certainly, they sure would, they would write it down.

Q. Now where would they write this down, any change [fol. 145] in the constitution?

A. Well, that would be written in the minutes of the executive board and probably the regular meetings.

Q. Do you know where the minutes of the executive board for the year of 1953 are, Mr. Zuefeldt?

A. Where they are?

Q. Yes, sir.

A. No, sir, I don't.

Q. Do you know if they are available?

A. No, sir, I don't know if they are.

Q. You mean that you know that they aren't, or that you know that they are?

A. Well, really and truly, I know that they aren't.

Q. All right. Why aren't they?

A. Because I took them home with me.

Q. And did you proceed to lose them after you took them home?

A. No, sir, I didn't proceed to lose them, they were lost, I had nothing to do with them.

Q. They were lost while they were in your possession?

A. Yes, sir.

Q. The records of 1953, 1952 and 1951?

A. I don't know how far they date back, I really don't, but I know I had them at home and they were lost in my home.

[fol. 146] Q. They are not available any more, you don't know where any—

A. No, sir, I don't.

Q. —record changes in this constitution would be then?

A. No, sir, I don't.

Q. I turn your attention to Section 7 on page 6 of the Plaintiff's Exhibit Number 6, which you have identified and ask you to read to the jury that provision.

A. Sections 6—

Q. 7 on page 6?

A. Seven. (reading) "The executive board shall between meetings have full and complete charge of all business of the local union. It may enforce and collect all dues and assessments, transmit money if so directed by the executive board of the United Association and transact such other business as may be necessary for the welfare of the union, including the voting of strikes."

Q. Now what is your testimony now, Mr. Zuefeldt, concerning whether the executive board had full authority over the union between meetings of the membership of the union?

Mr. Wells: If the Court please, that calls for a conclusion of the witness; the document is here and whatever it says, it is before the jury and before the Court now.

Mr. Smith: Your Honor, the question is—

[fol. 147] The Court: I don't know whether I got the full import of your question, what was it, counsel, what is your question?

Mr. Smith: Your Honor, previously the question was did the executive board of Local Union 100—

The Court: I understand. What is your question now?

Mr. Smith: —exercise full authority—

The Court: I [illegible] get that?

Mr. Smith: [illegible] question to him now is since he has mentioned the constitution, after examining the constitution,

does he wish to state that the executive board did or did not exercise full authority over Local Union 100 between meetings of the membership during the year 1953?

The Court: I will let him answer what he may know about it, if he does know.

A. Now you are asking for an opinion, I have had a lot—

Q. You were an officer of the union at that time?

A. Yes, sir, you are asking for an opinion.

Q. Yes, sir.

A. Well, my opinion was no.

Q. In what way did the executive board not abide by that provision in the constitution?

A. I don't think the executive board had a thing in [fol. 148] the world to do with collecting the dues or disbursing of the money, the only thing they could do was listen to a recommendation that would be put before them and then they make a recommendation to the general body as to how to dispose of the money, I don't think they had disposition of the money, they couldn't have done that without the secretary's authority, consequently, I don't think they had full power.

Q. All right, in other ways did they not have full power?

A. Well, they certainly didn't have the power to negotiate wages, they only helped and assisted, they did have the power to listen to any charges that was made against any member, and if they felt that he was due a penalty for it of some nature, money or what not, suspension—

Q. Mr. Zuefeldt, the question is, in what other way did they not exercise full power of the union; now I am not asking as to the duties that had been delegated out, I am asking as to what manner they failed to exercise full power over the union between the meetings of the membership?

A. In what ways did they not exercise full power of the union, you are speaking of the executive board now?

Q. Yes, sir.

A. Well, I just wouldn't know hardly how to answer that, in what ways, you had your agreements between your men and all about your working, and working hours, that [fol. 149] they participated in, and things that were for the welfare of the local that they had their voice in, but at the

same time,—I will put it this way, that they—the executive board members were elected for a two year term the same as we were, and if there would be something that would call one of the members to stay out of town on their job or he was sick and wasn't able to show up for so many meetings, and maybe they would get together and elect another man in his place, if he was experienced, maybe he might come in there, this one member might come in there with what we call, what I would deem a wild idea, make suggestions, that is what he would want to do, and because he wanted to do that, speaking through the chairman, why it wasn't necessary that we have to do that, if we felt that it was out of line.

Q. All right, Mr. Zuefeldt, would you please explain the procedure for a new member coming into the union from out of town, if he does not have his clearance card with him at that time?

A. Well, if he was coming from another town, he should by all means get his clearance card, or at least come into the local and make provisions for this manager of another local to wire him that it is on the way if he intends to transfer, and at the same time, if he wants to make a quick run, at least take his book along and show them that he is in good standing and assure the business agent [fol. 150] in event there is work there that he could produce a clearance card that he was in good standing in the local where he is going to clear from or otherwise, he couldn't go to work.

Q. Isn't it true, Mr. Zuefeldt, that in 1953, if you had your dues book and ten dollars, you could hand it to the business manager or financial secretary and he had to accept it and get your clearance card?

A. Well, that I understood is what you would call local working rules in some jurisdictions, but so far as I know, that wasn't a working rule in Local 100; it may have been, but if it did, I didn't know it, but they didn't accept them that way.

(Reporter marked an instrument as Plaintiff's Exhibit 7 for identification.)

Q. I will hand you what has been identified as Plaintiff's

Exhibit Number 7, which purports to be the constitution, by-laws and working rules of the United Association?

A. Yes, sir.

Q. And ask you if you recognize that book?

A. Yes, sir.

Q. Is that the constitution, by-laws and working rules of the United Association in effect in 1953?

A. Yes, sir.

Q. I turn your attention to page 74, Section 160, and [fol. 151] ask you to read that to the jury, sir?

A. You want me to read Section 160?

Q. Yes, sir.

A. (reading) "When a member enters a locality where there is a local of the United Association, and has no due book or clearance card, he shall be required to deposit the sum of $10.00 as a guaranty of good faith."

Q. Mr. Zuefeldt, doesn't that provision allow a man to come into the union even though he has no due book or clearance card?

A. Well, my interpretation of that would be that when I was business manager, in the event his clearance card had been lost or something like that, which has happened, during the time he would receive it, and he would deposit it and say "I have a clearance card, I will put up my book and $10.00 to assure you that I do have a clearance card."

Q. Does it say anything in this constitution about losing a book or anything like that?

A. No, sir, but it does happen.

Q. Doesn't it just provide that you have the right to become a member once you put your ten dollars down and that the union should check to see if you are in good standing?

Mr. Wells: Now if the Court please, he is calling for a legal conclusion, actually, the constitution says, if he has no dues book or clearance card, then so-an-so and so- [fol. 152] and-so.

The Court: I sustain the objection.

Mr. Smith: Your Honor, this man is the—

The Court: I sustain the objection.

Mr. Smith: All right, sir.

By Mr. Smith:

Q. Now, Mr. Zuefeldt, what was the practice about accepting dues books in Local 100 in 1953?

A. Accepting due books, well, we accepted due books but we didn't accept due books for clearance cards.

Q. If due books were presented, was the man admitted into membership of the union subject to his having his clearance card later brought in?

A. Well, I will say this, and answer it in this way, if I may; I didn't accept a due book in deposit for a clearance card while I was the manager of the local.

Q. Were you given instructions not to accept due books?

A. No, I was never given instructions to accept due books, I was never given that.

Q. Mr. Lanham never told you not to accept dues books?

A. Well, I didn't accept due books or clearance cards either while I was in office.

Q. Did Mr. Lanham accept dues books that you know of?

A. If he did, I didn't know about it.

Q. What was the policy of the union at that time, to [fol. 153] accept them or not accept them?

A. It would be a clearance card, you can accept clearance cards.

Q. You wouldn't accept anything but clearance cards, is that right?

A. You see, I didn't have anything to do with that, that was out of my—

Q. Well, isn't it the policy of the union that you would accept nothing but clearance cards?

A. That was the policy as far as I can remember, yes, sir.

Q. Now, Mr. Zuefeldt, can you tell us what "dobe" is? Mr. Borden mentioned "dobe" earlier this morning. Tell me what that term means?

Mr. Wells: If the Court please, the only reference to "dobe" was in reference to Mr. Borden's speech about his lawsuit over in Louisiana. There is no reference to that in connection with any issue in this case and accordingly, we object to it.

The Court: What is the materiality of it, counsel?

Mr. Smith: Your Honor, we expect to prove that "dobe" is a means whereby a man can work without having his clearance card in the union and that men did so work in Dallas, Texas, out of Local 100, they had not presented their clearance cards to this union.

[fol. 154] The Court: I sustain it at this point.

Q. Mr. Zuefeldt, was there any reason for not accepting due books and accepting only clearance cards?

A. Well, to this extent, unless, as I told you a minute ago, unless a man just comes in and say I lost my clearance card, there wasn't any reason for him coming in here without a clearance card, he should know where he is going with intentions of securing work before he gets a clearance card.

Q. Mr. Zuefeldt, my question was, was there any reason for accepting clearance cards and not due books?

A. No, sir, there is no excuse for not accepting clearance cards.

Q. Was there any reason why Local 100 would not do that?

A. Well, you mean why they would not accept a clearance card, well, there wasn't any, I would say, rule or by-laws of any reason why they wouldn't accept them.

Q. Didn't the executive board give orders not to accept dues books, didn't they tell Mr. Lanham and you not to accept due books?

A. Well, I have heard that out of members, but I didn't pay much attention to it.

Q. Didn't they tell you that?

A. Oh, I have had that told me, I will be honest about [fol. 155] it, I have had it told me.

Q. Didn't the executive board tell you that?

A. Oh, yes, but I didn't pay no attention to it.

Q. Didn't they tell Mr. Lanham that?

A. I have heard them tell him that, too, but I didn't know whether he paid any attention to it or not.

Q. You know he didn't accept them, though, after they told him, did he?

A. Well, you know he accepted clearance cards, he had to, he had to accept clearance cards.

Q. I am talking about dues books now, Mr. Zuefeldt.

A. Dues books, they just didn't make a practice of accepting due books here.

Q. Did Local Union 100 ever refer anybody out on a job who was not a member with a clearance card in that union?

A. Did they ever refer anybody out on a job without a clearance card in that union?

Q. Yes.

A. Yes, sir.

Mr. Wells: If the Court please, it seems to me we are getting into practices that have absolutely nothing to do with this lawsuit. Certainly there is no pleading to support anything about practices so far as other people are concerned.

Mr. Smith: Your Honor, they are stating in this case [fol. 156] that Mr. Borden should have—

The Court: I will let him answer.

Mr. Wells: I guess he has already answered it.

Q. Would you answer the question?

A. I answered it, yes, sir.

Q. Weren't many of these men members of other local unions?

A. The ones that I know of that were referred to a job without clearance cards was in the war time when man-power was scarce and you were using men to help do plumbing, fitting and welding, and they were not at that time probably a member of any local union. We were looking for man-power, we had to have it during the wartime.

Q. Did that also happen in 1953?

A. No, sir, I don't know of anybody that was sent out without a due book or—

Q. Is it your testimony here to this court that Local Union 100 did not refer anybody out on a job during the year 1953 who did not have a clearance card in this union, who was a member of another local union?

A. Oh, well, I got your question just a little bit wrong now.

Mr. Wells: If the Court please, I object to his cross examining the witness that he himself called.

Mr. Smith: He was called as an adverse witness.

[fol. 157] The Court: Overruled.

Mr. Wells: And with respect to matters that are wholly immaterial and irrelevant to any issue before the Court.

The Court: Overrule it.

A. You want to know if there was any members of the union that was referred out on a job without a clearance card?

By Mr. Smith:

Q. Who were not members of Local Union 100, with clearance cards?

A. Yes, sir.

Q. They were members of other local unions outside of Dallas?

A. Yes, sir.

Q. They were members of other local unions?

A. Yes, sir.

Q. Outside of Dallas?

A. Yes, sir.

Q. Is there any provision in the constitution making these men members of Local Union 100?

A. Yes, there is a provision if they wanted to be a member of Local 100, if they had a desire, if they didn't have a desire, why—

Q. Now we are talking about men who were referred out on jobs?

[fol. 158] A. Yes, sir.

Q. Who did not have their clearance cards here, who were members of other local unions, Mr. Zuefeldt, is there any provision that makes such men members of Local Union 100?

A. Other than that you have reference to, other than just coming here and going to work, yes, they could clear into this Local, if it was of their own free will and accord.

Mr. Zuefeldt, the question is, when those men are referred out on the job, who have not brought their clearance cards here, who are members of other local unions, is there any provision making them at that time members of Local Union 100?

A. No, they couldn't be a member of Local 100 and a member of another local, they can't be members of two.

Q. Did Local 100 collect dues from such men?
A. No, they didn't collect dues.

Mr. Wells: If the Court please, I am sorry to be continually objecting, but dues structure and practices of the union are beyond any issue tendered in the pleadings here, if there is some claim that the dues are wrong, why, at least, we are entitled to notice by way of pleadings.

The Court: What is the materiality of your last question, counsel.

[fol. 159] Mr. Smith: Your Honor, we are attempting to show the practice of this union to bring men from outside of this area into town to work on jobs to extract dues, and they would get more money from those dues than they would if a man became a member and that that was the reason they discouraged and did not accept due books and discouraged bringing clearance cards to this union.

Mr. Wells: Now, if the Court please, may I approach the bench, I think that is highly prejudicial, there is no allegation about it, actually, the evidence before your Honor is exactly to the contrary, they told the man to go get his clearance card, and when he got it,—

The Court: Go in the jury room, members of the jury, please go in the jury room.

(Reporter's Note: After a discussion between the Court and the attorneys, outside the hearing of the jury and off the record, the following proceedings were had in the presence and hearing of the jury.)

Mr. Smith: Will you please read the last question back?

Q. (reporter reading) Mr. Zuefeldt, the question is, when those men are referred out on the job, who have not brought their clearance cards here, who are members of other local unions, is there any provision making them at that time members of Local Union 100?

[fol. 160] By Mr. Smith:

Q. Will you answer that question, please, Mr. Zuefeldt?
A. Well, no, there is no provision making them a member of 100, they are still not a member of 100, as I told you, they can only be a member of one local.

Q. While those men are working here in Dallas, who are not members of Local 100, who are referred out by Local 100, do they pay any sums to the local union?

Mr. Wells: May it be understood that we have this continuing objection, if Your Honor please?

The Court: Yes, sir.

Mr. Wells: And our exception is noted.

A. Would there be—

Q. Did they pay any money?

A. —payment received by this local from those people?

Q. Yes, sir.

A. Yes, sir, there has been times when that existed.

Q. Didn't that happen in 1953?

A. Yes, sir.

Q. And how much was that that they would pay to this local union?

A. The fee was a dollar a week.

Q. Now did they at the same time have to pay additional sums at their home local?

[fol. 161] A. That or more.

Q. They had to pay their regular dues at their home local, didn't they?

A. Sure.

Q. Now on the dues that were accepted by the home local, is there any provision in the constitution as to what should be done with that money?

A. To pay their operating expenses, hired help and so forth.

Q. Well, was that to be split with the International Union?

A. Well, not necessarily split, they participate in a part of it.

Q. All right, now how much of the regular dues would the local keep and how much would they send to the International Union?

A. I think in 1953, I think the United Association got two dollars a month of every member that we paid in $5.00 a month.

Q. In other words, the local kept three dollars?

A. Yes.

Q. All right, on men who were out of town, and who paid a dollar a week, was any part of that ever paid to the International Union?

A. No, sir.

[fol. 162] Q. It was kept solely by the local union?

A. Yes, sir.

Q. Now you testified earlier that you were given instructions and Mr. Lanham was given instructions not to accept clearance cards, isn't that correct?

A. Well, I—it wasn't necessarily given to me at that time, because I couldn't accept a clearance card any way you would fix it, it was not my duty.

Q. Weren't you present when the executive board told Lanham not to accept clearance cards?

A. Oh, I have heard that, yeah, I have heard that.

Q. I said, weren't you present when the executive board told him that?

A. Yes, yes, that would be some member of the executive board.

Q. Did they give a reason why you should refuse clearance cards?

A. Well, that could be a lot of reasons of their own, I have heard different reasons why they didn't.

Q. At the time they gave him those instructions, did they give any reasons?

A. Well, there was five on that board, you know, some of them had some—may have had different reasons.

Q. I am asking you if any reasons were given at the time Mr. Lanham was given instructions not to accept [fol. 163] clearance cards?

A. Well, we'll say first, I will answer this way, some people out of our close locals preferred not to have their clearance cards here, for this reason, they would maybe be a member of an executive board or an examining board in the local where they belonged.

Q. That is not the question, Mr. Zuefeldt. Was there any reason given by the executive board, members of the executive board, at the time they told Mr. Lanham not to accept clearance cards?

Mr. Wells: Now, if the Court please, he was trying to answer that question when counsel interrupted him, we

renew the objection, it is wholly immaterial, but I think if the Court is going to let it in, he ought to let the witness answer.

The Court: Well, I will let him answer that last question.

Q. Go ahead, Mr. Zuefeldt.

A. Now, what question was I answering?

Q. You were answering the question: What reasons were given by the executive board at the time they told Mr. Lanham not to accept clearance cards?

A. Some of the reasons was this: That there would be members of Denison, Tyler, Fort Worth and Longview, Houston, Galveston and what not, that were coming here [fol. 164] to work on work whereby work was short at their home local, and they didn't prefer to have their clearance cards taken out of there for two or three reasons. First, if they took a clearance card out of their home local, it denied them the privilege of voting. The next thing, while they were denied the privilege of being an officer, they had to resign, because they cleared out of that local. It was simply for their own benefit, as a rule, because so many of those fellows, just because they were an officer in a local, maybe they couldn't secure work at that present time for that officer, because I remember working the president of the Tyler local here for as much as 60 days in a stretch, and certainly he didn't want to give up his officer's duty and be denied the privilege of being president in Tyler local just to come up here and work, so he had rather pay dobe, it was his own request. That was one of the reasons the executive board made those provisions, that he could come in here and work during this great amount of work, we say we had in Dallas at that time, and of course, the local by having, we will say two or three hundred more men here than they did in ordinary times, it would necessitate somebody to see that they were taken care of and that they were doing their duty as members of the local and peace and harmony and the rule went along and the rules went along and so forth, that was some of the reasons that they didn't want to make it compulsory [fol. 165] that clearance cards come in here, that was some of the reasons.

Q. That is fine, Mr. Zuefeldt, but we were talking about instructions by the executive board to Mr. Lanham to refuse to accept clearance cards. Now this connotes, or it could mean men who wanted to bring their clearance cards in here to the local, that is the question to you now.

A. Yes, sir, I am going to have to admit, in picking—I am going to have to admit that that did exist.

Q. And the reasons why they told him not to accept those clearance cards, to refuse them?

A. Well, I could say this is—

Mr. Wells: Excuse me just a moment, we are going to object to it as immaterial and irrelevant for each of the reasons already stated and also until some predicate is laid with respect to a time and place when a specific instruction was given, I don't think it is clear in this record whether counsel or the witness are talking about some general statements made by some individual board member, or whether or not it is claimed that there was some formal action taken by the board and I think it is confusing to the jury unless it is made clear.

The Court: I think his objection is good, sustain it.

By Mr. Smith:

Q. Mr. Zuefeldt, when was this instruction given by the [fol. 166] executive board to Mr. Lanham?

A. Well, I heard that in these years that you called, 1952, '53, while I was there with him, I have heard those instructions given numerous times.

Q. Did you hear this—

A. Sometimes these orders were given but not officially but probably be given by one member of the executive board but it wasn't in writing, it would just be handed from mouth to ear.

Q. Was there ever a formal meeting of the executive board where these instructions were given to Mr. Lanham?

A. It wasn't put in writing.

Q. I am not asking that question, I am asking if there was ever a meeting of the executive board where Mr. Lanham was given these instructions?

A. Yes, I have been in the executive board meeting where that was requested by one of the members.

Q. All right, in 1953, were those instructions given to Mr. Lanham?

A. Oh, yes.

Q. Now approximately when did that meeting take place?

A. Oh, well, I am just like the others, no dates.

Q. Was it the first part or last part of 1953?

A. I couldn't go along with those dates, that would be—

[fol. 167] Q. Was it prior to the time Mr. Borden came to Dallas?

A. I beg your pardon?

Q. Was it prior to the time Mr. Borden came to Dallas and you first saw him?

A. I would be afraid to say on that, I wouldn't know, I wouldn't say just what date it was, in fact, I don't know the date he came here.

Q. Well, I am asking you if it was prior to the time you first saw Mr. Borden, regardless of the date?

A. Yes, prior to the time I saw him, but that was here a long time before I saw him.

Q. And it was still in the year 1953. Were those instructions still in effect when you saw Mr. Borden the first time in 1953?

A. Never put in writing. I never saw those in writing, the body didn't concur in it, so consequently, it wasn't made official.

Q. But the instructions were in effect at that time?

A. Oh, you get instructions from them and the people on the sidewalk, you are always told how to run the local.

Q. All right. Now did they give you any reasons to refuse clearance cards of men who were from other local unions who wanted to come to Dallas to work—the question goes to men who wanted to bring their clearance cards in

[fol. 168] here, but whose clearance cards were refused?

A. Did they give me reasons why that they didn't want—

Q. Did they give Mr. Lanham reasons at that meeting?

Mr. Wells: At what meeting?

Q. The meeting of the executive board meeting we have been discussing, the executive board meeting in 1953.

A. And as I said, I have heard that by members of the executive board, but their outbreak of requests, but it was never put in writing, and consequently, if it was put in writing, before it would be made official, the minutes of that executive board would have to be carried to the next general meeting and read there and voted on to see whether or not it would be carried or not, and certainly a recommendation like that is in violation of the constitution and it never would be voted on, so consequently, if they asked that, it would be just merely a request, as I would put it.

Mr. Smith: In the interest of time, I will appreciate it if the Court will instruct the witness to answer the question.

The Court: I can't instruct him to answer it like you might want it; listen to his question intently and answer it responsively.

Q. At the time the instructions were given to Mr. Lanham, to refuse clearance cards, at that meeting of the executive board in 1953, what reasons were given by the [fol. 169] executive board members at that meeting why he should refuse those clearance cards?

A. Well, certainly anyone who makes that request wouldn't tell him the reasons, now. I might know of the reason, or think I know of a reason, but I don't think that would help you, I don't think it would help me or anybody else, I think I know what their reason was, but I don't think because they wanted it that I would have to do it. I think I know what their reasons were, but other than being nice to their neighbor, but they didn't tell what their reasons were.

Q. Did Mr. Lanham ever tell you to send the out-of-towners to him and he would see to it that they didn't go out on jobs or if they did go out, they would be on dobe?

A. No, he didn't tell me they weren't going to go out, but I had instructions there if a stranger come there that I didn't know to be a member of the local, to secure work or for information or about the working situation here in Dallas, why I was to refer him to Mr. Lanham.

Q. Didn't Mr. Lanham also tell you that he would see that they didn't go out, or if they did, they would go out on dobe?

A. No, he didn't tell me that, he sure didn't.

Q. Did Mr. Mullally, who was an International organizer, ever discuss with you the fact that the local union was not [fol. 170] accepting clearance cards?

A. Yes, sir, I have known him to be in here to discuss that, that he had complaints.

Q. Do you recall—

A. I don't know the dates on it.

Q. Do you recall any discussions with him during the year 1953?

A. Well, it wouldn't be any discussion between me and Mr. Mullally, it would be just mere hearsay, I mean, hearing, happen to be there present when he come in to talk to Mr. Lanham, if he had a complaint of anybody, if he hadn't accepted his clearance card, why then Mr. Mullally would sometimes, or at times he did get reports of that and he would come in to make an investigation and see whether or not this man had been refused the acceptance of his clearance card.

Q. Now when did you hear Mr. Mullally discussing that with you or any other officials of Local 100?

A. I don't know the dates on it.

Q. Do you remember any such discussions in 1953?

A. With Mr. Mullally, yes, I remember, not relative to this case now, on clearance cards.

Q. Now when did you hear Mr. Mullally discussing that with either you or other officials of Local 100?

A. Now pardon me again, are you talking now about [fol. 171] clearance cards?

Q. Yes, sir.

A. Well—

Mr. Wells: If the Court please, the witness has said he hadn't heard any conversations about this case, pertaining to this case, and I want to renew my objection that this has absolutely nothing to do with any issue before this court.

Mr. Klein: Your Honor, they have alleged here that their agent and the local union and that the International union had not authorized or ratified the conduct of Mr. Lanham in refusing to put Mr. Borden out on the job,

now we are showing here a course of conduct which shows authorization for them to do the very thing they did in this case. Certainly we are entitled to go into what they had been doing immediately prior to the time Mr. Borden came into Dallas and the fact that they all knew that they were doing it and acquiesced in it and ratified it and participated in it.

The Court: I am not so dogmatically certain about it. Overrule it.

By Mr. Smith:

Q. Now who was Mr. Mullally discussing this matter with at the time you heard him talking about it?

A. Well, he would always be discussing, he would, first, [fol. 172] when he would come to the office, certainly he come to see the business manager, he didn't come to see me, unless I had maybe some charge against me, but his visits always first were to see the business manager.

Q. All right, what did Mr. Mullally say at that time and who was he discussing it with?

A. Now what time are you talking about now, Mister?

Q. At the time in 1953 that you have related you overheard a conversation by Mr. Mullally and—

A. I couldn't tell you who the man was he had reference to. I couldn't recall right at this time, of any man's name, they wasn't in droves, there were just a few.

Q. Who was Mr. Mullally talking to?

A. He was talking to Mr. Lanham.

Q. All right, now what did he say to Mr. Lanham and what did Mr. Lanham say to him?

A. "I have a report that you have refused clearance card from a man from a certain town that come and presented his clearance card to you and wanted to clear in for the purpose of securing work." That is about the general conversation and that is about the way it would come, I don't know that it would be in that words, but that would be about the nature of it as I remember.

Q. What did Mr. Lanham say?

A. Mr. Lanham had some of them, some, well, he didn't [fol. 173] present it right, others come here, I doubted

whether or not they were capable of working, that was during, right after the war, that they got in and we suspicioned that maybe they had come in from a local where they didn't require special and complete training that they should have, he was a little bit in doubt about them being capable and he had various reasons he didn't want to take that clearance card.

Q. We are talking about a conversation in 1953 and what Mr. Lanham said?

A. Well, I couldn't relate a conversation that he had because they come at various times, and that was just—there wasn't enough of that being discussed to really make an issue of it.

Q. It is your testimony that you do not recall what Mr. Lanham said to Mr. Mullally and what Mr. Mullally said to Mr. Lanham on the occasion you are talking about in 1953?

A. No, I don't really do, I really don't.

Q. Well, did Mr. Mullally discuss this with Mr. Lanham many times during 1953 or was it just one occasion?

A. No, it would be sometimes maybe 60 days before he would show up, hiding out.

Q. I say, did he discuss it with Mr. Lanham many times during 1953 or just—

A. No, it wasn't many times, it wasn't many times.

[fol. 174] Q. More than two?

A. Well, yes, I believe it would be more than two.

Q. About how many times did he have to come over and discuss it with him?

A. Well, we will say four, I don't know, I just heard it, I don't know.

Q. Did Mr. Mullally ever mention any action that would be taken by the International union against the local union if they continued that practice?

A. Yes, I heard that, I heard about that one time, that he made a statement that if that had been their practice, if that continued, why he was going to do something about it.

Q. Did he say what he was going to do?

A. Well, we knew what he could do.

Q. He didn't say what he was going to do?

A. No.

Q. Did Mr. Lanham ever tell you that Mr. Borden came in with a job in his hip pocket and that that was the reason he wouldn't send him out on the job at the Republic Bank?

A. No, sir, Mr. Lanham never did tell me that he come in with a job in his hip pocket.

Q. What words did he use?

A. The first time I remember hearing about this was when he told me he had come in and asked him to accept a [fol. 175] clearance card and that he did and Mr. Borden had in mind going to work for the Republic Bank Building and at that time he didn't have any calls for any journeymen of any nature, he just didn't have any calls for anyone at the Republic Bank but told him that he could give him a job as close into town, if it was transportation he was trying to save, as the Republic Bank, and a job that would probably go as long as the Republic Bank, although it was not as big, but it was half as high, and couldn't work as many men, that it would be as profitable a job, what we call a good job, as the Republic Bank, but he didn't have a call at that time for the Republic Bank and that the man was a little bit displeased about it, but at the same time, he accepted his order he issued to him, and that he was going to go to work for the Spencer Plumbing Company on the Doctors Building right directly across the street from the Baylor Hospital, which was a good job, lasted several months.

Q. Now you heard Mr. Borden testify this morning, didn't you?

A. Yes, sir.

Q. And his testimony was to the effect that he first saw you in connection with the Spencer Plumbing job when you and Mr. Lanham were going down the stairs, is that correct?

A. Well, I will put it this way, Mr. Borden saw me and knew me, which if I am working for 1200 people, and they [fol. 176] see my name in a magazine, they know my name before they come here, and when they come here, if they told me their name and then they walked down the street and then come back, why, I wouldn't know them probably again, because they come in droves, going from north to

south and from east to west, and we thought nothing of any issue would be made of anything we done, if we did, he would tell me probably more about it, but I knew of nothing wrong about it that anybody had done wrong and couldn't see nothing wrong about it and he had given him as good a job as he had that was available at that time.

Q. Did he give you any other reason for not taking on Mr. Borden at the Republic Bank job?

A. Well, now Mr. Lanham told me this one time, he told me this, too; said he approached him one time before but said he was not in very good condition, but that is just hearsay, he told me that, I don't know what the condition was, I didn't see the man.

Q. Did he give you any other reasons why Mr. Borden was not to be referred out on the Republic National Bank job?

A. No, sir.

Q. Mr. Zuefeldt, have you ever had occasion to observe Mr. Borden's work as a plumber?

A. Yes, sir.

[fol. 177] Q. What is your opinion of his work as a plumber?

A. I think Mr. Borden is a good mechanic, I have seen his work and it is good.

Mr. Smith: No further questions.

Cross examination.

By Mr. Wells:

Q. Mr. Zuefeldt, you indicated that the per capita tax to the United Association was I believe you said $2.00. The constitution in effect in 1951—

A. I believe it was a dollar.

Q. —was a dollar—shows a dollar and a quarter, does that refresh your recollection about that?

A. Yes, I do now, just on that $2.00 I really and truly have been told about that, that they had raised this, well, I didn't know they had raised dues here in this—

Q. Actually, directing your attention to the time when you were the business agent and Mr. Lanham was the busi-

ness manager, who had charge of the financial end of the thing?

A. Mr. Lanham solely.

Q. Did you have anything to do with that at all?

A. No, sir, he paid me my checks, nobody else.

Q. If the constitution required somebody coming in from another local union to deposit travel card with the [fol. 178] financial secretary, what is the reason for such a provision as that, is it because he is the man who keeps the books and is responsible for it?

A. You mean what is the reason for the secretary where he is coming from to give him—

Q. What is the reason for the practice whereby the travel cards are handled by the financial secretary instead of somebody else?

A. Is whereby they will be supervised and taken care of with the right kind of people and to observe the rules of the UA constitution.

Q. When a travel card is deposited here in Dallas, does that then make the man a member of the Dallas local?

A. Yes, sir—you are talking about a clearance card?

Q. I used the word travel card and I had meant to say clearance card, but you understood me.

A. Yes, sir, I did.

Q. All right. And when a clearance card comes in here to Dallas then the man then becomes a member of the Dallas local?

A. That is right.

Q. And if he was a member of the Shreveport local at that point, he has lost his membership in the Shreveport local?

A. That is right.

[fol. 179] Q. Insofar as standing for office over there or whatever—

A. Benefits or—

Q. —benefits they might have in the way of retirement, benefits or pension or anything like that?

A. It sure does.

Q. And do you find some members who would prefer to stay in their home locals, so-called, in order to maybe run

for political office over there or maybe for some other reason to stay in their home local?

A. Numbers of them who wouldn't work here if they had to clear in.

Q. And is it necessary so far as the Dallas local is concerned, when a clearance comes in here that it be handled by the person who is responsible for the handling of the books because membership benefits depend on when it is deposited and accepted here?

A. That is right.

Mr. Wells: I believe that is all. Thank you—no, one other question.

By Mr. Wells:

Q. You say Mr. Lanham he appeared not to be in very good condition, did you mean—did he tell you Mr. Borden appeared to have been drinking?

A. Yes, sir.

Mr. Wells: That is all.

[fol. 180] Mr. O'Donoghue: No questions.

Redirect examination.

By Mr. Smith:

Q. Now, Mr. Zuefeldt, you said that Mr. Lanham told you that Mr. Borden had apparently been drinking, is that what you said?

A. Yes, sir.

Q. Have you ever seen Mr. Borden take a drink?

A. No, sir.

Q. Have you ever seen him drunk?

A. No, sir.

Q. Have you ever seen him when he appeared to you to be drunk at all?

A. No, sir.

(Reporter marked an instrument as Plaintiff's Exhibit No. 8 for identification.)

Mr. Wells: We stipulate you don't need to prove it up.

Mr. Smith: You will stipulate to this—I have no further questions.

Mr. Wells: You might go ahead and offer it so that the record—

Mr. Smith: Will you also stipulate that Farwell Construction Company is a member of the Mechanical Con-
[fol. 181] tractors Association and that this was the wage rate during the year 1953?

Mr. Wells: If the Court please, at counsel's request, we stipulate that what he has had marked for identification as Plaintiff's Exhibit 8 is a true copy of an agreement between the Mechanical Contractors Association of Dallas, Inc., and Local Number 100, which was entered into 30 June 1953, and was signed by Mr. Carter, A. B. Carter and Mr. Sam Wallace for Mechanical Contractors and by Mr. Fred Zuefeldt and John Cullum for Local 100. We further stipulate that Farwell, Inc., was a member of the Mechanical Contractors Association.

The Court: All right.

Mr. Smith: We at this time would like to offer into evidence Plaintiff's Exhibits Numbers 6, 7 and 8.

Mr. Wells: Excuse me, I think when you put that back together you got some of those pages upside down.

Mr. Smith: The last page is upside down.

Mr. Wells: Do you have a photocopy for me?

Mr. Smith: No further questions.

The Court: Stand aside.

Mr. Klein: We call Cleo Lanham, Your Honor.

[fol. 182] Cleo Lanham, after being first duly cautioned to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Klein:

Q. State your name for the record, please?

A. Cleo Lanham.

Q. Where do you live, Mr. Lanham?

A. 1339 Oakland Road.

Q. And how are you employed?

A. As a plumber.

Mr. Wells: Excuse me, Mr. Lanham, this jury over here has got to hear you and we have got to hear you down here, speak up, a little, please, sir.

A. Okay, maybe I can get a little closer to this.

Q. Are you employed by someone as a plumber, Mr. Lanham, or do you work on your own?

A. By someone.

Q. And who do you work for at this time?

A. I have been working for TexMex Mechanical Contractors out of Waco.

Q. All right, now are you a member of Local 100 and of the United Association, the defendants here?

A. Yes.

[fol. 183] Q. And how long have you been a member of those unions?

A. About twenty years.

Q. During that twenty years, Mr. Lanham, have you ever held any elective offices?

A. Yes.

Q. Would you tell us what offices you held and over what period of time?

A. Well, I have held practically all of the offices in Local 100 outside of recording secretary and sergeant of arms.

Q. All right, when was that?

A. Well, I can't call the years, I started back in the early forties.

Q. And what was your next elective office?

A. After those?

Q. Yes, sir?

A. Well, I was elected business manager.

Q. When were you elected business manager?

A. The first time in '44.

Q. And how long did you serve at that time?

A. Two years.

Q. And were you subsequently elected business manager again?

A. Yes.

[fol. 184] Q. When?

A. I was elected in December of '49, taken office in the first part of January.

Q. Of 1950?

A. Yes.

Q. And how long did you serve as business manager?

A. Through '53.

Q. So you served—at that time did you have three year terms?

A. When I first started, I believe it was one year term, and then later on they changed it to two year term.

Q. So actually, you were elected twice?

A. Yes.

Q. All right, Mr. Lanham.

Mr. Wells: Excuse me, he was elected once back in '45 and then he was elected twice after that in the fifties.

Q. I mean you were elected twice this last time?

A. Well, I thought you were talking about this last time.

Q. You were elected twice between the period from December of '49 through December of '53?

A. Well, it seems to me like maybe it was three times, you see, if I was elected for '50, then I would have to be elected for '51, and then I was elected then the next time [fol. 185] for two years, I believe, I believe that is the way it is.

Q. All right, now, Mr. Lanham, while you were business agent during the year 1953, would you tell us what the status of the work was with regard to the members of your union here in Dallas County?

A. Well, what do you mean, the status?

Q. Well, I mean, was there a lot of work for the members of your union, or was work real slack?

A. Well, at times the work was good and then at times it would fall off.

Q. All right, how was the work say, in September 1953?

A. Well, that is pretty hard to remember, that has been a long time ago.

Q. Do you remember when your deposition was taken, Mr. Lanham, in this case?

A. No, not offhanded, I don't, not no date.

Q. You do remember it was taken, though, don't you?

A. Oh, yes.

Q. And you remember at the time your deposition was taken on page 17, line 17 (reading) "All right, what would have been the result if you had accepted Mr. Borden's clearance card at that particular moment? Answer: Well, at that particular moment, the best I can remember, we had plenty of work and I could have sent him right on out; we [fol. 186] had plenty of work going." Do you remember saying that?

A. Well if it is in there, I am quite sure I said it, sir.

Q. So it is your testimony at the time Mr. Borden first presented his dues book to you or his clearance card there was plenty of work going here in Dallas County?

A. I am quite sure there was.

Q. Now do you remember the first time that you saw Mr. H. N. Borden, the plaintiff in this case?

A. I believe I do.

Q. Where did you first see Mr. Borden?

A. In my office.

Q. Was that during regular business hours?

A. Yes, sir.

Q. Approximately what time was that?

A. I believe it was in the morning.

Q. And do you remember approximately what month?

A. No, I don't.

Q. Would it have been sometime around August or September?

A. It could have been, but I really don't remember.

Q. All right, now, what was the first conversation you had with Mr. Borden?

A. Well, he came into my office and introduced himself.

Q. Now did he come into your office or—

[fol. 187] A. Yes, sir.

Q. Came right on into the office?

A. Yes, sir.

Q. All right.

A. He came into my office and introduced himself, and he said, "Lanham, I understand you have a fence around this town." He said, "I have carried a card for a long time

and I know my way around." He said, "I don't want you giving me any static." He said, "I have my clearance card here and I want a work order to the Republic National Bank."

Q. That was the first time you ever saw him?

A. Yes, sir.

Q. And he said he had his clearance card?

A. Yes, sir.

Q. Did he have his clearance card?

A. Yes, sir.

Q. All right. Did you accept his clearance card at that time?

A. No, sir.

Q. You did not accept his clearance card?

A. Not at that time.

Q. All right, why didn't you accept his clearance card?

A. Well, the man was drinking and the way he conducted himself, I wasn't going to put him to work under those [fol. 188] conditions, and so I just thought I would let him cool off for a while and I handed his card back to him.

Q. The man was drinking?

A. Yes, sir.

Q. Mr. Lanham, I will hand you what has been marked here as Plaintiff's Exhibit Number 7 and ask you if you will read to the jury, starting right there where it says, "When"?

A. (reading) "When a clearance card is deposited in a proper sister local as above set out by the—proper sister local as above set out by a journeyman, the sister local upon presenting this card by the journeyman member must accept said clearance card."

Q. Any qualification anywhere else in that constitution as to the fact that you must accept that clearance card?

A. Not that I know of.

Q. All right, now the clearance card was in proper form, wasn't it?

A. Yes, sir.

Q. And Mr. Borden's dues were properly paid up, weren't they?

A. Well, I suppose they were, or he wouldn't have had a clearance card.

Q. All right, so he was sober enough to present a properly filled out clearance card and to present his dues book?
[fol. 189] A. Yes, he was sober enough to bring it in there, yes.

Q. All right, now what did—what other reason did you have for refusing to accept his clearance card, other than the fact he had been drinking?

A. Well, in a job like that, you are supposed to use common sense and judgment and in my opinion, if a man is clearing from one local to another, especially a strange local, he should conduct himself in a gentlemanlike manner, which he didn't, to my opinion.

Q. And that was the only reason, because you didn't think he conducted himself as a gentleman?

A. That is right, he certainly didn't conduct himself as a gentleman.

Q. All right, now what led you to believe that Mr. Borden had been drinking?

A. Well, I have seen a lot of it and you could smell it on the man's breath, he was standing right close to me, his face was flushed, naturally, I believe anyone who has ever been around people drinking could certainly tell that he was.

Q. Did you observe him when he walked?

A. Well, not particularly.

Q. So you don't know whether he was able to walk without stumbling or anything or not?
[fol. 190] A. Well, he walked in there.

Q. He did walk in?

A. So far as I know.

Q. All right, Mr. Lanham, if you had accepted that clearance card at that time, as the constitution provides that you must, I believe that is the language of it, isn't it, you must accept it?

A. All right.

Q. If you had accepted that clearance card at that time, there was not a thing in the world that would compel you to refer the man out on a job, was there?

A. Well, not particularly, no, I wouldn't think so.

Q. So you could have accepted his clearance card and waited until he sobered up to refer him out on a job, couldn't you?

A. I could have done that.

Q. Now Mr. Lanham, I want to read you a portion of the pleading here that has been filed on behalf of Local Union 100, wherein it is alleged (reading): "Pleading further Defendant would show that at no time during the period which Plaintiff claims that he was damaged were all the members of Defendant Local Union employed, and that as a matter of fact, there were substantial periods of unemployment for substantial numbers of the members of the local union, and that this union owed no duty to Plaintiff in these circumstances to prefer plaintiff for [fol. 191] employment over other members of the local union." Now that is contained in the answer of the local union in this case. Now in light of your testimony on deposition and in light of your testimony a moment ago that there was plenty of work when Mr. Borden presented his clearance card, that allegation is not correct, is it?

Mr. Wells: Now, if the Court please—

The Court: Sustain the objection.

Q. The allegation is not correct insofar as it goes to the time Mr. Borden presented his clearance card, is it?

Mr. Wells: May I—

The Court: Sustain the objection.

Q. All right, Mr. Lanham, let's go back to the time the Republic Bank was commenced. Did you ever have any difficulty with the contractor over there with regard to Local Union 100 furnishing plumbers to that contractor?

Mr. Wells: Now, if the Court please, we object to any controversy that there may have been at the beginning of the Republic Bank job, a year or more before any matter alleged here, and it is remote, both as to time and wholly immaterial and irrelevant as to this Plaintiff.

The Court: What is it you are asking him, Counselor?

Mr. Klein: I am asking him, Your Honor, if there was not a—may I approach the bench, Your Honor?

The Court: Yes, sir.

[fol. 192] Reporter: Is this for the record?

Mr. Klein: It doesn't make any difference.

It is our intention to prove, Your Honor, that this same conduct was engaged in by the union in regard to another man who came in here, and that as a result of their refusing to send him a clearance and referral to Republic Bank, that the Farwell Construction Company employed him anyway, and that as a result of that, Local Union 100 would not send any men to that job for a period of three or four weeks.

The Court: Kind of run that by me again.

Mr. Klein: We think we can prove, Your Honor, that a fellow named Jack Heath came in here under the same circumstances that Mr. Borden did, that Local Union 100 refused to accept his clearance card and refused to send him out on the Republic Bank job and Farwell Construction Company hired him anyway; the union then refused to send any man out to that particular job for a period of three or four weeks, a fact that was known to all of the members of Local Union 100.

The Court: So what?

Mr. Klein: Well, Your Honor, it is simply showing a course of conduct on their part. They allege that they knew nothing of this conduct.

The Court: What conduct?

[fol. 193] Mr. Klein: The practice of refusing to accept clearance cards and refusing to refer people out on jobs.

Mr. Smith: In other words, to show the conduct that they authorized their office to engage in this—

Mr. Klein: The very thing that we are complaining of.

Mr. Smith: —the very thing they claim was solely known only to Mr. Lanham. We say that the knowledge of what the agent was doing was known to all members of the local and that they participated in it and it had been a previous—

The Court: You want to prove an isolated transaction with another person, is that what it—

Mr. Klein: Not necessarily an isolated transaction.

The Court: All right, another transaction?

Mr. Klein: Of an identical nature.

Mr. O'Donoghue: When did that occur, a year before?

The Court: Sir?

Mr. Klein: That is what I am hoping to find out.

Mr. Wells: The question indicated when the job started.

The Court: Tell me again exactly what you are attempting to prove.

Mr. Klein: Well, your Honor, Farwell Construction Company wished to employ as general superintendent a [fol. 194] Mr. Jack Heath; Mr. Heath came in with a clearance card, just as Mr. Borden did. The union refused to accept his clearance card and to give him a referral to the Republic Bank. Farwell Construction Company put him to work anyway.

The Court: When?

Mr. Klein: That is what I am trying to find out, Your Honor. The union then refused to send any men to that job for approximately three or four weeks. The dispute was finally resolved and they accepted the clearance card.

Mr. Smith: This course of conduct of the agent was known then; now, they are claiming in this case, Your Honor, that whatever Cleo Lanham did, is on Cleo Lanham's own shoulders, and not that of the union. We are attempting to show the union members knew of the actions of the agent in this instance and in previous instances, and that they had ratified and authorized his previous conduct and established authority in their agent—

The Court: You mean you are trying to prove prior to this or are you trying to prove subsequent to it, which?

Mr. Klein: Prior to it.

Mr. Smith: Prior to it.

The Court: Or you just don't know, which?

Mr. Klein: We are trying to prove prior to it, Your Honor, not to show ratification, but to show authorization.

Mr. Smith: They gave the authority to their agent to [fol. 195] so act.

Mr. Wells: Judge, if we submit that whatever may have happened with respect to the superintendent on a job, it can have no effect of being an authorization with respect to attitude toward the rank and file non-supervisor at a time more than a year later. It is wholly unrelated. Beyond that, we think we are entitled to some pleadings—

The Court: I sustain it on the grounds that you don't give any definite time about it. Sustain the objection.

By Mr. Klein:

Q. Mr. Lanham, are you acquainted with a Mr. Jack Heath?

A. Yes, sir.

Q. I believe Mr. Heath is deceased at this time?

A. Yes, sir, I understand that.

Q. Do you know of your own personal knowledge whether or not Mr. Jack Heath ever worked on the Republic National Bank job here in Dallas?

A. Yes.

Q. Do you know when Mr. Heath went on that job?

A. No, I don't.

Q. Do you know when the Republic National Bank job started?

A. Well, not exactly, that has been a long time ago and we had a lot of jobs, you know, start different years and different times, it would be hard to recall just when it [fol. 196] did start.

Q. Do you know approximately when it started?

A. I wouldn't say because I don't remember.

Q. All right, do you know approximately when Mr. Heath went on that particular job?

A. No, I don't.

Q. Did you refer Mr. Heath up to that particular job?

A. The best of my knowledge, you wouldn't have to refer him to the job.

Q. Was he a member of Local Union 100?

A. He was, yes, sir.

Q. When did he become a member of Local Union 100?

A. I don't remember.

Q. Would you records reflect that?

A. Yes, sir, I imagine they would.

Q. They would reflect when Mr. Heath became a member of Local 100?

A. That is, if they have the records, it would.

Q. During 1953 did you have occasion to refer any member, any men from Fort Worth to the Republic Bank job?

Mr. Wells: Now if the Court please, we object to any testimony about some man from Fort Worth, or a group

of men from Fort Worth, there is nothing in the pleadings about it and it is wholly irrelevant and immaterial.

The Court: I overrule it.

[fol. 197] Q. You may answer.

A. Will you ask the question again?

Q. During 1953, did you have occasion to refer any men from Fort Worth to the Republic Bank job?

A. Well, I might have, I don't remember whether I did or not.

Q. Do you remember whether or not you referred to the Republic Bank job a Mr. Hugh Jones in 1953?

A. I don't remember, no, sir.

Q. Now, Mr. Lanham, will you tell us briefly what the function of the executive board was during the year 1953 in Local 100?

Mr. Wells: We object to that on the grounds it is matters covered by the constitution and by-laws.

The Court: Oh, I will let him answer what he knows.

A. Will you ask that question again?

Q. Will you tell us briefly what the function of the executive board is?

A. The function or the duties, what do you mean?

Q. Well, their duties?

A. Well, actually, I don't memorize it, their duties are laid out in the constitution, working rules and by-laws and offhanded I couldn't just—

Q. Well, what did they do ordinarily?

[fol. 198] A. Well, they were officers of the local and they met between meetings and carried on any business that was necessary, they—

Q. Did they ever—go ahead, I am sorry.

A. That is all.

Q. Did they ever give you any instructions with regard to how you were to perform your job?

A. They might request me to do certain things or something like that.

Q. Well, is that the only authority they had to request?

A. I believe so.

Q. How many members do you have on the executive board?

A. Five.

Q. And those five members are all elected members, is that correct?

A. Yes.

Q. Now, Mr. Lanham, you have heard Mr. Zuefeldt's testimony that you were instructed by the executive board at a meeting during 1953 not to accept any clearance cards, do you remember that particular meeting?

A. No, sir.

Q. Is it your testimony that it didn't happen?

A. I didn't hear Mr. Zuefeldt say that, it seemed to me [fol. 199] like he said some one member might have suggested it.

Q. Well, do you remember any meeting where the executive board instructed you not to accept clearance cards?

A. No, sir.

Q. Do you remember any meeting where some one member might have instructed you not to accept clearance cards?

A. Not offhanded; some one member might have suggested it, I won't say that they didn't, but offhanded I don't remember it.

Q. And the only thing that you remember is that some individual of the executive board instructed you not to accept clearance cards?

A. That might have happened, but I don't remember such an occasion.

Q. You don't even remember that?

A. No, sir.

Q. Do you remember Mr. Mullally ever coming to you during 1953 and telling you that he had received complaints on your failure to accept clearance cards?

A. I wouldn't say that he come to me in '53, I don't remember the year, but I know in the past, say the four years I was in there that he might have come to me about some certain member, about his clearance card, I don't remember though.

[fol. 200] Q. You were here this morning when Mr. Thurman testified, weren't you?

A. Yes.

Q. You heard his testimony with regard to a call he placed to you for H. N. Borden on the Republic Bank job?

A. That is right.

Q. Do you remember that conversation?

A. No, sir.

Q. Is it your testimony that it didn't happen?

A. I don't remember Mr. Thurman calling me.

Q. So you won't say that you didn't say what Mr. Thurman said?

A. I don't believe I ever talked to Mr. Thurman about it.

Q. Well, are you saying you are not sure, or are you saying that you did not?

A. I am going to say that I did not. It has been a long time ago, but I don't think that I ever talked to Mr. Thurman about it at all.

Q. Well, now, that is what I am trying to figure out here. Are you saying that you did not talk to him or you don't think you talked to him?

A. It is pretty hard for a man to come right out and say something like that when it has been seven or eight years ago, a conversation with some member when I had thou-

[fol. 201] sands and thousands of them.

Q. Well, the question is, did you say that to him, or do you think maybe you didn't say that to him?

A. I think I didn't.

Q. You think, but you could have said it?

A. I don't think I did, no, sir.

Q. But you could have?

A. I didn't understand.

Q. But you could have said it, you are not positive that you didn't?

A. I am going to say that I did not talk to Mr. Thurman about Mr. Borden because I remember no such thing.

Q. So it is your testimony that you positively did not talk to Mr. Thurman about Mr. Borden?

A. That is right.

Q. That is your testimony?

A. Yes, sir.

Q. All right.

Q. Mr. Lanham, how often did you have a general meeting of the membership during 1953?

A. Well, I don't remember the exact time of year that it changed, we used to, and some time way back, and I don't know whether it was in the early fifties or late fifties or what that we used to meet, have a regular meeting once a week, but then they changed it and I believe during that [fol. 202] time it was twice a month, I believe that was what we had, twice a month.

Q. And at the meeting of the general membership?

A. That is what I am talking about.

Q. Did you then receive the minutes of the executive board meeting and approve or disapprove those?

A. Yes, the minutes of the executive board was read before the body at every regular meeting and either accepted or rejected or what not.

Q. Mr. Lanham, after you refused to accept Mr. Borden's clearance card within say a month or two, did you report to the executive board your difficulty with Mr. Lanham?

A. No, sir, it never did come up—with Mr. Borden, it never did come up before the executive board.

Q. You never did say anything at all to the executive board about it?

A. No, sir.

Q. Were you instructed by the executive board that you were to refer all clearance cards to them?

A. I don't ever remember any such recommendation.

Q. How often did the executive board meet?

A. Well, we had our regular meetings twice a month, I would say that the executive board met twice a month, I believe that is the way it was.

[fol. 203] Q. Did they meet immediately prior to the general meeting, or during the week?

A. Yes, they met between meetings.

Q. Mr. Lanham, the contract in evidence here, as the contract between the local and the general contractor shows that the wage rate was, I believe, $2.90 an hour, is that correct, or do you remember?

A. I don't remember, sir.

Q. Well, do you remember what the wage rate was during the year of 1953, would it be the amount contained in this contract?

A. I can't say, because usually we had negotiated a new agreement every year and it changed every year, the wage agreement did, so—

Q. When did you ordinarily negotiate that wage agreement?

A. I believe, I am not sure, I am just guessing that our wage agreement was up each year, in July, somewhere along about that time.

Q. Did you remember whether or not you negotiated a new wage agreement in July 1954?

A. Well, it might have been May or June, somewhere along in there, I am not sure.

Q. And you don't remember what the new wage agreement was?

[fol. 204] A. No, I don't remember.

Mr. Klein: We have no further questions, Your Honor.

Cross examination.

By Mr. Wells:

Q. How old are you, Mr. Lanham?

A. 56.

Q. How long have you lived in Texas?

A. 56 years.

Q. How long have you been a member of the Plumbers Union?

A. About 20 years.

Q. What education have you had?

A. Oh, about to the eighth grade, I believe.

Q. You have lived in Dallas all your life?

A. No.

Q. Where?

A. Well, I was born in Rockwall over here and raised up in Denton County, over here close to Lewisville.

Q. And how long have you followed the trade as a plumber?

A. Well, I turned out as a plumber in 1929, I believe.

Q. What do you mean, turned out?

A. I taken my state examination.

[fol. 205] Q. Now have you ever held any office in this local except by election of membership?

A. No, sir.

Q. And sometimes they preferred you and sometimes they preferred somebody else?

A. That is right.

Q. Did you stand for election in 1953?

A. Did I do what?

Q. Did you stand for election, did you offer yourself to succeed yourself in 1953?

A. Yes.

Q. Is that the election in which Mr. Galvin was also a candidate?

A. That is right.

Q. And he beat you at that time?

A. That is right.

Q. And so how long did you continue as business manager?

A. Well, the new officers usually take office after the first meeting in January; they are obligated in our first meeting in January.

Q. And do you overlap with them for a few weeks there, so as to help them get started?

A. Yes, ordinarily you are asked, if a new man comes in as business agent or business manager, to stay in there [fol. 206] as long as they feel like they need you to get them acquainted with the office and where everything is at and get them started.

Q. And did you do that in January of '54?

A. Yes, sir.

Q. So Mr. Borden is telling this jury he is suing for a 12 months period, but if he starts his period in September of 1953, you had anything to do in an official capacity just from September 15, '53 to sometime in January, '54?

A. Yes, around the 1st of January.

Q. Then what happened to you?

A. Well, I just went out and went to work as a journeyman.

Q. Now Mr. Klein asked you about the first time that you met Mr. Borden and you have told us about a conversation you had with him at which you say you refused his clearance card?

A. That is right.

Q. Prior to that time, had he ever come in there and tried to get you to take just his book?

A. If he did, I don't remember anything about it. That is the first time I ever remember seeing him.

Q. You never did have any controversy with him?

A. No, sir.

[fol. 207] Q. That was significant enough that it even came to your attention before that?

A. No, sir.

Q. All right, sir, now you have told us about the first time you do remember; did you have any contact with him after that?

A. Yes, I seen him around the local union there, you know, the next few days, he was around there and I was in and out all the time and I would see him around there.

Q. Well, after this occasion when you say he was drinking and you refused his clearance card, how long was it before you had another conversation with him, if you remember, a day or two, or how long?

A. Well, it might have been a day or a day or two, I don't remember. It seems as if he was kind of in my hair every time I would stick my head out around there, he would say something to me sarcastic, and I didn't want to have any fuss with him, so I would just go on and get away from him the easiest way I could.

Q. Well, did there come a time that you had a further conversation with him?

A. Uh—

Q. Did you accept his clearance?

A. I accepted his clearance the first time I ever seen him—no, I didn't, it was a week later, I beg your pardon, [fol. 208] I am kind of mixed up on this thing.

Q. Well, let's get unmixed. Tell this jury just what happened about that, are you able to be specific as to the number of days, whether it was a week later or a day or two later?

A. No, I can't, that has been a long time ago and my contact with so many people, members, not only our own people, but a lot of members passing through here, it seems like every man that comes from the north or the east came through Dallas, maybe going toward the West Coast, and they would stop off here to inquire about a job, some of them, maybe not want a job in Dallas, but they would be inquiring about work.

Q. Well, let's get to what contact you had with Mr. Borden. You told us about the time when he first came and when you refused his card, now at some later date, a day or two after that, or perhaps as much as a week after, did you have another conversation with him?

A. Well, I had another conversation with him, I mean quite a long conversation when I accepted his clearance card.

Q. Where was that?

A. That was in my office.

Q. Just tell us what occurred on that occasion?

A. Well, he came up there one morning and the door to [fol. 209] my office is right close to the head of the stairway and my name as business manager—it wasn't my name—it just said, business manager. He knocked on the door and I came to the door and he said, "Lanham, I would like to talk to you", and I said, "Okay", and so he came in and sat down, and he said, "Lanham", he said, "I felt like I have made an ass of myself the last few days and I want to apologize to you", he said, "I am broke and I need to go to work", and I said, "Okay, Borden, I will put you to work", and at that time Mr. Borden acted and looked like a different man to what I had seen him before.

Q. Was there any indication on this occasion that he was drinking?

A. Not on this occasion, no, sir.

Q. Did you then accept his clearance card?

A. That is right.

Q. And then did you then refer him out to the Spencer Plumbing or was it later that he—

A. Well, he was given a referral, I don't remember whether I wrote the referral or whether Mr. Zuefeldt or Mrs. Davis.

Q. There has been some reference in this record to Mrs. Davis. Who is she? Is she some elected official of the union?

A. No, she was just—well, we call her secretary she was [fol. 210] a bookkeeper and did all of, you know, the office work around there.

Q. And what was the custom or practice with respect to writing referrals, who did the writing of referrals?

A. Well, any three of us, Mrs. Davis was allowed to write referrals, Mr. Zuefeldt was, and myself.

Q. But with respect to clearing into a local and accepting membership in a local, you did require that that come to you personally?

A. That is right.

Q. When you referred Mr.— or when Mr. Borden's clearance card was accepted, did he indicate he was unhappy with you or the local union in any way?

A. Not a bit; he seemed to be in a very good humor and as I said, he apologized to me and so far as I was concerned, the way it looked, everything was all right.

Q. Now while he was working at Spencer Plumbing Company out there, did there come any complaints of any kind?

A. Not that I remember of.

Q. Were regular union meetings being held and regular meetings of the executive board being held all that while?

A. That is right.

Q. So far as you know, did he make any complaint to either the local union or the executive board about the matter?

[fol. 211] A. No, sir.

Q. Now I believe he testified that after he went to Spencer, he went either to Keiffer or Rose, was that before Mr. Galvin took over or was that after Galvin took over, or do you remember?

A. I don't remember, sir.

Q. By the time you left office in January 1954, was there any pending complaint from Mr. Borden or anybody else complaining about the matter?

A. No, sir.

Q. Now did there come a time almost a year later in October or November 1954 when the executive board summoned you to ask you about it?

A. Well, it must have been around a year later, the first I ever heard about it.

Q. Are you presently an officer of this union?

A. Now?

Q. Yes.

A. No, sir.

Q. Are you actually employed now?

A. No, I am not.

Q. I believe you said TexMex was your last employment?

A. That is right.

Q. Had you ever heard or known about Mr. Borden before September or October 1953?

[fol. 212] A. No, I didn't know him, never heard of him or seen him.

Q. Had you had any calls for him from anybody?

A. No, sir.

Q. Before he came in there?

A. No, sir.

Q. Or after he came in there?

A. No, sir.

Q. Now with respect to your practice there, sometimes would you get calls for specific named individuals, if a particular employer knew that that man was a particularly good man?

A. Yes.

Q. And other times would you get calls just for, "Send me a plumber" or "Send me a fitter", or "Send me a welder"?

A. That is right.

Q. Who did you get your calls from for work on the Republic National Bank Building?

A. You mean for plumbers?

Q. Well, for anybody, if it was different, just tell the jury about it.

A. Well, I received all my calls for plumbers from Jack Heath.

Q. And he was the superintendent on the job?

A. That is right.

[fol. 213] Q. And did you receive calls for other kind of people?

A. Yes.

Q. What kind?

A. Well, if it was for steam fitters, or welders, a fellow by the name of Grady George seemed to be more or less in charge of that under Mr. Heath; he did the calling for those fellows.

Mr. Wells: I believe that is all. Thank you.

Cross examination.

By Mr. O'Donoghue:

Q. Just one question, you have testified that you didn't talk to the executive board about Mr. Borden, you didn't talk to Mr. Mullally here, did you?

A. No, sir, I never remember talking to Mr. Mullally about it.

Mr. O'Donoghue: That is all.

Redirect examination.

By Mr. Klein:

Q. Mr. Galvin, when you got a call—I mean, Mr. Lanham, when you got a call from, we will say, Mr. Heath, and he asked for a particular person, what was the policy of Local Union 100 during the year 1953?

A. If a man called for a certain man and he was a [fol. 214] member of our local, and he was available, we sent him to him.

Q. All right. Now you testified that you were the only one authorized to accept clearance cards and refer people out on the job, is that correct?

A. I wouldn't say I was—

Mr. Wells: Your Honor, that is two different questions. He testified he was the only man authorized to accept clearance cards.

Q. That is what I understood to accept clearance cards, you were the only person authorized?

A. Well, I wouldn't say that I was authorized, it is in the UA constitution, that no one but the secretary of the local union shall accept clearance cards.

Q. All right, Mr. Zuefeldt could—and since you were the only one that could accept clearance cards, no one could be referred out until you accepted their clearance card, is that correct?

A. Well, I wouldn't say so, not necessarily.

Q. In other words, Mr. Zuefeldt could refer people out if they were willing to pay dobe?

A. No, I didn't say that.

Q. All right, isn't that a fact, if someone came in with a dues book and they didn't have their clearance card, didn't want to put their clearance card in here and were willing to pay dobe, Mr. Zuefeldt could refer them out?

[fol. 215] A. No, sir, if a man come in and wanted to leave his card at home, and present his book with me, and we talked it over and I decided it was best to go along with him, I handled that; Mr. Zuefeldt had nothing to do with it.

Q. He did not refer out anyone who was on dobe?

A. Not unless I okayed it.

Q. All right, could Mr. Zuefeldt refer out members of Local Union 100?

A. That is right.

Q. Now did I understand your testimony a moment ago that if you had ever seen Mr. Borden prior to the time that he presented his clearance card, you don't remember it?

A. That is right.

Q. Is it possible you have him mixed up with someone else in regard to the first time?

A. I say he presented it, he presented it, that is right, but I didn't accept it the first time I seen him, that is the first time I ever remember seeing the man at all.

Q. All right, but it is possible you had seen him prior to that time but you just don't remember it?

A. Well, it is possible, because I have seen a lot of people.

Q. Now subsequent to the time that you talked to Mr. Borden and subsequent to the time or prior to the time that you accepted his clearance card, did you have any conver-

[fol. 216] sation with Mr. A. G. Thurman who testified here this morning?

A. I don't ever remember talking to Mr. Thurman about it.

Q. You don't ever remember talking to Mr. Thurman about Mr. H. N. Borden?

A. No, sir.

Q. Not from 1953 to the present time?

A. That is right.

Q. Isn't it a fact, Mr. Lanham, that if you can keep clearance cards out of here and keep people from clearing into this Local Union 100, there will be more overtime for the people who are members of Local Union 100?

A. I wouldn't think so.

Q. It is your testimony then that the more people you have in Local Union 100, the more overtime you will have?

A. Our people never forced any contractor into overtime that I can remember.

Q. If there is a shortage of labor, the contractor is forced into overtime, isn't he?

A. I have never seen a time whereby we couldn't get enough members from other locals to man our work.

Q. Who else was present, Mr. Lanham, at this first conversation you had with Mr. Borden, when he first presented his clearance card?

[fol. 217] A. As well as I can remember, it was just he and I, I don't remember whether Mrs. Davis—she might have been close around our offices or joined to each other, a door between them, and it stayed open all the time, now I don't know whether Mrs. Davis heard any of the conversation between he and I or not, I couldn't say.

Q. All right. Who, if anyone, was present when you ultimately accepted his credit card and you say he made this apology and so forth?

A. Well, as I remember just he and I.

Q. No one heard that conversation?

A. No, he just came up to my door and knocked and came in.

Q. All right, approximately how far is it from your desk to the desk of Mrs. Davis?

A. Oh, about I would say, around eight feet.

Q. If she was present, she would have been able to hear this conversation?

A. Well, if she had been listening, you know, or didn't have anything else to do, but I wouldn't say she was.

Q. All right, now you heard the testimony of Mr. Zuefeldt that he had heard a conversation between you and Mr. Jeff Mullally with regard to your refusal of clearance cards. Is his testimony substantially correct in that regard?

[fol. 218] A. Well, I don't remember, as I said before, about Mr. Mullally talking to me about clearance cards, offhanded I don't even remember it, that has been a long time ago and it is just possible that Mr. Mullally could have talked to me about somebody about a clearance card.

Q. You do not deny then that the conversation could have taken place?

A. No, I wouldn't deny it, because Mr. Mullally probably has talked to me, I don't remember.

Mr. Klein: All right, that is all we have, Your Honor.

Recross examination.

By Mr. Wells:

Q. Just one other question, then. About the physical make-up of the office there, Mr. Borden testified with respect to several conversations in which he said that he knocked on a door and a wicket there, did you hear that testimony about a cage or wicket or little window?

A. Yes.

Q. And I believe there was an occasion or two when he said that you slammed that in his face. Now would you tell this jury just what the physical setup was down there in 1953 with regard to whether or not there was such a door there at that time?

[fol. 219] A. Well, I might say this, we will take, for instance, this right through here, we will say this is a hall outside and then there is a door here, opening into a room something like this right here, say five or six feet square, and right here is a little arch, a pay window, just like you might see in a bank, where the members could come through this door out of the main hall because usually if

there are a lot of people up there, they are standing out in this hall talking, so that would give a man privacy to come in here where there wouldn't be any noise, you know, to pay his dues and talk to anyone he might see fit, and so—

Q. And if the man then was standing say, north of the wicket, and the office would be to the south of the window, is that right?

A. That is right.

Q. And the union agent would be standing inside the office?

A. That is right.

Q. What was the nature of that wicket or that division between the union agent and the man?

A. Well, as I say, there was a little arch there made of wood and above that there was latticework, say an inch and a half wide, this latticework went up to the ceiling and was about, say, an inch and a half apart.

Q. So it was latticework through which you could see? [fol. 220] A. Oh, yes, you could see all over the office from there.

Q. Now was there any closing for that wicket?

A. No, sir.

Mr. Wells: That is all. Thank you.

Mr. Klein: No further questions, Your Honor.

The Court: Stand aside and we will take a five minute recess.

(Reporter's Note: Court reconvened following the recess at 4:47 p.m., at which time the following proceedings were had in the presence and hearing of the jury:)

Mr. Smith: Your Honor, at this time we would like to call Mr. Thurman back to the stand.

A. G. THURMAN, being recalled, testified further as follows:

Direct examination.

By Mr. Smith:

Q. Mr. Thurman, are you the same A. G. Thurman who testified previously in this case?

A. That is correct.

Q. Mr. Thurman, how long did you say you had known Mr. Borden prior to the time he first talked to you concerning the Republic National Bank job?

A. Oh, approximately a year, maybe a little over.

[fol. 221] Q. You say you worked with him down on the Galveston job?

A. That is right.

Q. During the time you have known Mr. Borden up to the present time, have you ever seen him take a drink?

A. You mean water or intoxicants?

Q. Intoxicants?

A. I have never seen the man take an intoxicant of any kind.

Q. Have you ever known him or heard of him drinking other than here in this courtroom today?

A. No, sir.

Q. Mr. Thurman, I will ask you, you have heard some testimony here concerning the setup of the office in Local Union 100, that it was solid or that it was wicker, can you tell us what the facts were in regard to the physical setup of the office in Local 100?

A. Any particular time; it has been changed.

Q. 1953?

A. No, sir, I couldn't. In '53, I have seen it, changes in it, two or three times, at different times, but I couldn't tell you what it was in '53.

Q. Have you seen it wicker?

A. Yes.

Q. Like Mr. Lanham described it?

[fol. 222] A. Yes.

Q. Have you seen it solid as Mr. Borden has described it?

A. Well, I wouldn't say solid, but I think I have seen it when there was a sliding door over the window, I don't know whether it was '53, '54, or what year.

Q. Was it such at that time that you could not see in the office without looking through that window?

A. I wouldn't go so far as to say either way. I am sure there is lattice above that you could—well, a tall man might see over any window that might be there, I don't know just exactly how you—

Q. Could you see in the office?

A. There has been times that I couldn't see in the office.

Q. All right, and there have been times when the physical setup was such that you couldn't see in the office except through this window, is that correct?

A. That is right, when the doors were closed.

Mr. Smith: I have no further questions.

Cross examination.

By Mr. Wells:

Q. Do you recall that a solid door was put there in 1955, Mr. Thurman, or do you know about that?

[fol. 223] A. No, I don't.

Q. Well, do you recall that at one time there was a latticework of some kind and later it became solid?

A. Well, I remember at one time that there was latticework and no little cubbyhole office, I believe, as you might call it, where one member might come in, or two or three, I have seen as many as five, but it was pretty crowded, and then with the latticework looking into the office.

Q. Would you agree—you heard Mr. Lanham's description of that kind of a cubbyhole, that three or four people could get in, and then the latticework and then the office, is that your recollection of it?

A. I have seen it that way, yes.

Q. And then at some later date it was your testimony it was made solid?

Mr. Smith: If Your Honor please, he is not testifying at a later date, he said he didn't know.

The Court: I will let him answer it.

A. I have seen it since I have belonged to the local where you could not see in there.

Q. What I am trying to get is, your recollection of which was first, the latticework or—

A. No, I don't remember.

Q. You just don't remember?

[fol. 224] A. That is right.

Q. Now presently you know that the local union is not even in that same building?

A. Certainly, I know it.

Q. And has not been in that building since about '57?

A. I think that is approximately the right time.

Q. Now I believe you testified that you have never seen Mr. Borden take an intoxicant of any kind. If I recall, you testified when you were first on the stand that you never had any social contact with him of any kind?

A. That is correct.

Q. So you would not have been in a position to know whether he drank or not?

A. No, sir.

Mr. Wells: That is all.

Redirect examination.

By Mr. Smith:

Q. Mr. Thurman, I have just one further question. Have you ever hired anybody on the job, on that Republic National Bank job, except through union referrals, as is the custom here?

A. No, sir, and furthermore I hate to be called a liar, when I don't lie, when it is nothing to me, but that is neither here nor there.

[fol. 225] Mr. Smith: No further questions.

Mr. Wells: No further questions.

The Court: Call your next witness.

Mr. Klein: I would like to call Mr. B. C. Hall, Your Honor.

Mr. Smith: If the Court please, Mr. Thurman, as most witnesses and jurors, is a working man; we would appreciate it if he could be excused at this time unless the defendant has further use for him.

Mr. Wells: May I have just a minute. Could he be available on an hourly call?

Mr. Smith: You could be available, could you not, Mr. Thurman, on call?

Mr. Thurman: Tonight?

Mr. Smith: No, tomorrow.

Mr. Thurman: Oh, yes.

Mr. Smith: Or later.

Mr. Wells: We have no objection.

The Court: All right.

[fol. 226] B. C. Hall, after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Klein:

Q. Would you state your name, please?

A. B. C. Hall.

Q. Where do you live, Mr. Hall?

A. Chandler, Texas.

Q. And what business are you in?

A. I am in the plumbing business and butane gas business.

Q. Mr. Hall, have you ever been a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada?

A. I have.

Q. Are you presently a member of that organization?

A. No.

Q. How long were you a member of the United Association?

A. Oh, about 14 years.

Q. And when did you let your membership lapse in the United Association?

[fol. 227] A. In '56.

Q. Mr. Hall, are you acquainted with Mr. H. N. Borden, the Plaintiff in this case?

A. I am.

Q. How long have you known Mr. Borden?

A. About 17 or 18 years.

Q. And have you ever worked with him on the job or has it been strictly a social acquaintance?

A. Just social.

Q. Mr. Hall, could you tell us whether or not you were in Dallas, Texas, in the latter part of 1953?

A. I was.

Q. And what were you doing here at that time?

A. Well, I was working here.

Q. You were working here?

A. In '53, part of the time.

Q. And were you a member of Local 100 of United Association?

A. No.

Q. What local were you a member of?

A. 231.

Q. Where is that local?

A. El Paso.

Q. El Paso?

A. Yes.

[fol. 228] Q. Did you attempt to become a member of Local Union 100?

A. I tried to clear in here two or three times.

Q. When did you try to clear in during—did you try to clear in in '53?

A. I tried to clear in between September, October and November of those years.

Q. And what were you told at that time?

A. They wouldn't accept—

Mr. Wells: Just a moment, may we approach the bench. We are going to object to any testimony with reference to this matter as immaterial, and irrelevant to any issue that is raised in the pleadings. We have had no notice of any claim with respect to anybody other than Borden.

The Court: What is it you are seeking to prove?

Mr. Smith: We are not seeking to prove a claim for this man, we are seeking to show that the officers and agents of the local union at that time were denying clearance cards, that it was known by the general membership that it was, as to out of town men, dobe purpose, as we previously informed the court, and actually the agents and officers of the union were authorized to, by the members of the union, to engage in this course of conduct as to out of town persons and it goes to the authority—

[fol. 229] Mr. Wells: We point out particularly in this state of the record that all of their own witnesses testified—

Reporter: I am sorry, I can't hear you.

Mr. Wells: I say, we point out that in this state of the record, that it is undisputed that the plaintiff did clear in here and we therefore say it is irrelevant that they may not have let other people clear in.

Mr. Smith: Well, the testimony is that Mr. Borden cleared in, forced his clearance card on them and that that is the reason they discriminated against him, the union constitution provides that a man has an unequivocal right to clear into the union, that this is the reason the action was taken against the man.

The Court: I will let him prove it.

Mr. Wells: Note our exception, please.

By Mr. Klein:

Q. What were you told at the time you attempted to clear into Local Union 100 in 1953, Mr. Hall?

A. Well, they told me they weren't accepting no clearance cards, they didn't have jobs at that time and they weren't accepting no clearance cards.

Q. All right. Subsequent to that time did you work in Dallas during 1953?

A. About the time you could have left your book and they gave you and—and you paid what you call dobe, whatever you call it, left your book until you got through [fol. 230] working, and then when you left there, why, you go by and pay up what you owe, or a steward would collect it, and you go by and pick your book up.

Q. Did you work in Dallas after your clearance card was refused, did you work here in Dallas during 1953?

A. I did.

Q. Now did you have occasion to see Mr. H. N. Borden during the latter part of 1953?

A. I did.

Q. Do you remember approximately when you saw Mr. Borden?

A. Well, I was up here quite a few weeks, as I come each week, around the latter part of September or first of October, I don't know which.

Q. Now where did you see Mr. Borden?

A. Saw him outside of the union hall.

Q. And did you have any conversation with him at that time?

A. I did.

Q. Now did you have occasion to attend any meeting of local union 100 during the latter part of 1953?

A. I attended one meeting up there, one or two.

Q. Do you remember about what month that was in?

A. It was the first of October.

Q. Around the first of October?

[fol. 231] A. Yes.

Q. Do you remember anything that was discussed during that particular meeting, Mr. Hall?

A. Well, the only thing that I remember, is they used to bring up, Mr. Borden's name was mentioned.

Q. Do you remember what was said at that membership meeting in regard to Mr. Borden?

A. Well, something another about all of them talking he come in there wrong, or something, and they weren't going to put him to work or something like that, something like that—

Reporter: I am sorry, I didn't hear you.

A. His name was mentioned and it was referred to me that I knew the man and therefore, it didn't strike me what was happening until you talk to some of the rest of them.

Q. All right, you say his name was mentioned, was his name brought up on the floor, was it in the executive minutes or how was his name brought up, do you remember?

A. Well, they read off the minutes and this and that, and brought up, his name was brought up, they said they wasn't

going—Borden came in there wrong, wanted to go to work, and said they wasn't going to put him to work.

Q. Did they make any explanation of what they meant by "he came in there wrong"?

A. No.

[fol. 232] Q. And you say that you have known Mr. Borden for 17 years?

A. Yes, or more.

Q. Mr. Hall, have you ever seen Mr. Borden take a drink of any alcoholic beverage?

A. No.

Q. Have you ever heard of him taking a drink?

A. As long as I have known him, I never have.

Q. Have you ever seen him in an intoxicated condition?

A. No, I haven't.

Mr. Klein: That is all we have, Your Honor.

Cross examination.

By Mr. Wells:

Q. What work did you do here in Dallas, Mr. Hall?

A. I worked for Alford Plumbing Company.

Q. On what job?

A. Housing project in '53.

Q. And what period of time did you work for Alford?

A. I guess it was, I don't know offhand, I was on so many jobs, about four or five weeks, something like that.

Q. And who else did you work for in here at that time?

A. That was the only one I worked for. I worked for [fol. 233] Levy Plumbing Company, I worked for Brown-Olds, in '55.

Q. That was in '55?

A. Yes.

Q. And you were in here in '53?

A. '53.

Q. And then again in '55?

A. And in '54.

Q. And also in '54?

A. Yes, I didn't work in '54.

Q. Now I believe you said your card was in El Paso?

A. Yes.

Q. Your card remained in El Paso?

A. Yes.

Q. How long was it that you were working out of this local with your book up in this local, the Dallas local?

A. Worked here, all the time I was working in '53, I just left my book at the office.

Q. And that was for a few weeks while you were working for Alford?

A. That is right.

Q. But not while you were working for anybody else?

A. No, it was there, I had to send my clearance card back.

Q. Do you have any way of dating this meeting at which there was a discussion of Mr. Borden?

[fol. 234] A. No, I don't, because I come to Dallas now and when I was working all the time, about two weeks out of a month, sometimes three.

Q. Could it have been in 1954 or 1955?

A. No.

Q. How do you fix it then in '53?

A. Well, there is two other reasons that are not involved on this question, but I came up here to see a fellow that I was partly doing business with sometime and I definitely know I saw Mr. Borden down in front of the union hall and heard the squabble about the reason why he said they wasn't putting him to work.

Q. Now was Mr. Borden at that meeting?

A. No, I didn't even see him at the meeting and I didn't even see him until after then.

Q. How long from the meeting at which his name was mentioned until you did see him?

A. I wouldn't say, I wouldn't say, it might have been the next week or two weeks, I don't know.

Q. How long before that had it been since your paths had crossed before?

A. Oh, I imagine a year, six months to a year.

Q. Do you know who mentioned his name in the union meeting?

A. Up on the floor, no, I don't remember his name, I [fol. 235] do not.

Q. Was he making a speech or making a motion or making an objection, or what was he doing?

A. I think it was at the regular meeting, reading the minutes off, I think, I won't be positive what happened in there.

Q. You say you are going to be positive or you are not?

A. I won't be positive, no, sir.

Q. Well, was the name read off of a piece of paper or was it spoken by somebody without reference to the paper?

A. Well, the best judgment so far as I can remember, they were reading it off of a book, so far as I know, there was so much excitement and stuff, doing and twisting, and they were trying to get order in there, I don't remember.

Q. You just don't remember?

A. No.

Q. All right.

A. I think it was read off of a book, the best of my knowledge.

Q. Can you describe the book?

A. No, sir.

Q. Was it a looseleaf book or a bound book or what?

A. When you read the minutes off, they usually have a book or a ledger, whatever you want to call it, I don't know what they keep—read the minutes off of, or what, I wouldn't [fol. 236] Q. Was it this kind of a book?

A. I wouldn't say, I don't remember. You can't remember that long back.

Q. This kind of a book?

A. I wouldn't remember whether it was one of the two, I would not, no, sir.

Q. What other business was transacted at that meeting?

A. I don't know, they usually bring up a lot of stuff and I don't remember, only what got me, I just remembered his name was brought up because I knew the man. I went on and I didn't—

Q. How many union meetings of Local 100 have you attended?

A. Either three or four.

Q. Only three or four?

A. Yes, sir, I usually attend them when I come in some, show your book there at the front.

Q. Did you attend any in 1954 or '55?

A. '54?

Q. Yes.
A. I attended one, I sure did, up there.
Q. How about '55?
A. I don't remember whether I attended one or not, I might have had.

[fol. 237] Mr. Wells: Thank you very much.
Mr. Klein: No further questions, Your Honor.
The Court: Stand aside. Ladies and gentlemen, we will stand recessed as to you until 9:30 in the morning. Bear in mind the instructions heretofore given you and be back at 9:30.

(Reporter's Note: Court reconvened July 20, 1960, at which time the following proceedings were had in the presence and hearing of the jury:)

JOHN GALVIN, after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Klein:

Q. Would you state your name, please?
A. John Galvin.
Q. Where do you live, Mr. Galvin?
A. 3636 Asbury.
Q. And how are you employed?
A. Steam fitter.
Q. How long have you been a steam fitter, Mr. Galvin?
A. Oh, the best part of 20 years.
Q. Mr. Galvin, there has been some testimony here about steam fitters and about plumbers, will you tell us basically [fol. 238] what the difference between a steam fitter and a plumber is?
A. Well, to a person not familiar with the trade, it is—well, I think you will find it in the U.A. constitution, the distinction is drawn between journeymen, welders—journeymen steam fitters and journeymen plumbers. So far as the State of Texas is concerned, a journeyman plumber is licensed by the State. The steam fitter does not come under

the State plumbing code as such and is not required to carry a license.

Q. All right, now, are both plumbers and steam fitters eligible for membership in the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitters Industry of the United States of America?

A. That is correct, we are made up of plumbers, steam fitters, refrigeration fitters, welders, general pipe fitters, lead burners, it all comes under the general classification of plumbing and pipe fitting.

Q. And are you a member of the United Association?

A. Yes, I am.

Q. And are you a member of Local Union 100?

A. Yes, I am.

Q. How long have you been a member of the United Association?

A. 14½ years.

[fol. 239] Q. And how long have you been a member of Local Union 100?

A. 11 years.

Q. Have you ever held any elective offices in Local Union 100?

A. Yes, I have.

Q. What offices have you held, Mr. Galvin, and over what period of time?

A. I was elected as a member of the executive board to an unexpired term October 1952, and continued in that office until it expired in December, 1953.

Q. Now you were a member of the executive board during September of 1953?

A. Yes, I was.

Q. All right. And what other offices?

A. I was elected business manager, financial secretary, treasurer of the local union in December 1953 and held that office from January 1954 through December of 1955.

Q. You say you were elected business manager?

A. Business manager, financial secretary and treasurer, a combination job.

Q. For '54 and '55?

A. That is correct.

Q. And you held the same office in '54 and '55 that Mr. Cleo Lanham held in 1953?

[fol. 240] A. That is correct.

Q. All right. Mr. Galvin, are you familiar with the contract entered into on June 30, 1953, between the Mechanical Contractors Association of Dallas and the United Association?

A. Somewhat.

Q. Do you know when that particular contract expired?

A. June 30, 1954.

Q. Now I believe the contract provided that the minimum wage for plumbers, pipe fitters and steam fitters during the term of that contract would be $2.90 an hour, is that correct?

A. Yes.

Q. Do you know whether or not a new contract was negotiated in 1954?

A. Yes, there was.

Q. Do you know what the wage rate for the contract negotiated in 1954 was?

A. $3.00.

Q. That was for plumbers, pipe fitters, and steam fitters?

A. That is right.

Q. All right. Mr. Galvin, are you familiar with Mr. H. N. Borden?

A. Do I know him?

[fol. 241] Q. Yes.

A. Yes.

Q. How long have you known Mr. Borden?

A. I became acquainted with him sometime in 1954, I would guess, during the time I was in office, and have known him since.

Q. All right, do you know what classification Mr. Borden has in the United Association of Journeymen?

A. Journeyman plumber.

Q. All right. You say you first met Mr. Borden in 1954 what was the occasion of your meeting Mr. Borden at that time?

A. I was guessing, I don't know whether it was '54 or '53. The occasion I met him, no, I don't remember at all.

Q. Do you have any recollection of any conversation with Mr. Borden with regard to him being assigned or referred to the Republic Bank job?

A. Well, actually, so far as Mr. Borden was concerned, I didn't think any more of his conversations with me pertaining to the Republic Bank job until I was served with—well, not served with, but received a letter from a lawyer named Hultgren, along about August or September of 1954. When I received a letter, I recalled that Mr. Borden had talked to me on one or two occasions about the fact that he thought he should have been on the Republic Bank [fol. 242] job and that was the extent of it.

Q. When did you say that was?

A. When I received a letter from Mr. Hultgren.

Q. You don't remember having any conversation at all with Mr. Borden prior to that time?

A. Nothing out of the ordinary in the way of conversations with him. When you are in a job such as a business agent or business manager and you have several hundred members and have a period of unemployment, people are coming to you with their stories day in and day out and Mr. Borden's story, as I have recalled it, and as I have been brought up short with that letter, he felt that he had a grievance against Mr. Lanham, who had preceded me in office and he was somewhat upset, but at the same time it didn't seem to mean anything, it was just one of those gripes.

Q. Do I understand your testimony that when you received that letter you remembered then that Mr. Borden had come to you at some time previous to that?

A. He had talked to me about it.

Q. Prior to the time you received the letter from Mr. Hultgren?

A. Yes, we had discussed it.

Q. Do you remember back approximately when that was?

A. I couldn't give any date, as I say, I don't even [fol. 243] remember when I first met Mr. Borden.

Q. Well, could you give any period of time prior to the time you received that letter?

A. Probably in the spring of 1954.

Q. In the spring of '54 and you say you received the letter when?

A. Around August or September of 1954.

Q. All right, now when Mr. Borden came to you with his complaint that—what did you say his complaint was?

A. He felt that he had been mistreated as far as going on a particular job.

Q. Did he tell you why he felt he had been mistreated?

A. Well, the gist of what he told me, as I recall it, was that he claimed he had a call from the job to go to work and that Mr. Lanham had refused to send him there.

Q. All right, let me ask you this, Mr. Galvin, what was the policy of the union during 1953 and 1954 with regard to referring men to a job when the mechanical contractor called for a particular man?

A. Send the man to the job.

Q. You sent the particular man who was called for?

A. If he was called for by name, yes, that has been a general practice in this local as long as I have been any way at all connected with it.

[fol. 244] Q. All right, now, you were at the time, in the spring that Mr. Borden brought that complaint to you, you were business manager of Local Union 100?

A. That is correct.

Q. And as business manager of Local Union 100, did you have any jurisdictional power, authority, and so forth, to handle that sort of complaint?

A. As I mentioned, when I had the conversations with Mr. Borden, it was not listed in the form of a complaint. It was in the form of a conversation with me in which a man was citing a grievance, shall we say, or an old army term, he was just bitching about the fact that he wasn't on a particular job and complaining about another man who had preceded me in office, and that he thought that man had mistreated him. Now, let's put it another way, it is the type of typical political talk which you hear on all sides during the course of a tenure in office. Those who are in hear the gripes from those who are complaining, rightfully so, or not, about those who had preceded them in office.

Q. Are you through, Mr. Galvin?

A. That is up to you.

Q. Would you answer the question that was asked now?

Mr. Wells: I submit if the Court please, he did.

Mr. Klein: Your Honor, I asked the man if he had any authority to handle complaints. He went into this dissertation about—I am not sure what he was talking about, but he has not answered my question as to whether or not it was his job to handle complaints of members of the union.

[fol. 245]

A. If I had a complaint, I took care of it.

Q. You had the authority then to handle a complaint?

A. Yes, I did.

Q. All right, what did you do about Mr. Borden's conversation?

A. Oh, I think it is evident from what I said that I did nothing about it.

Q. All right. Now, when you received that letter from Mr. Hultgren, what did you do?

A. The first thing I did was pick up the phone and call my lawyer.

Q. That is Mr. Wells?

A. Yes, sir.

Q. All right, and then what did you do?

A. Took the normal course, contacted my executive board and followed through with an investigation; at the first meeting after receipt of the letter, contact the membership through letting them know in my usual business report to the local about the events that were taking place concerning their business.

[fol. 246]

Q. You did advise the membership of Local Union 100 of Mr. Borden's complaint?

A. I didn't advise them of anything, I made them aware of the receipt of the letter.

Q. All right. Mr. Galvin, did you, after you received that letter, have any conversations with Mr. Borden regarding his complaint?

A. Yes, sir.

Q. Will you tell us what that conversation consisted of?

A. I was in the company of the general organizer and business agent and we visited the job on which Mr. Borden was working and asked him why he was bringing the suit and he told—

Q. Had suit been filed at that time?

A. No, it was—I suppose you would call it in the form of a threat of suit.

Q. All right.

A. We asked him why he was taking that course instead of taking the normal procedure through the usual UA channels within the framework of the constitution, and he said that he thought he had after contacting a lawyer, he thought he had rather go that way, I don't remember his exact words at all.

Q. All right.

A. But he indicated he preferred to go a lawsuit.

[fol. 247] Q. And after that time did you have anything further to do with Mr. Borden's complaint?

A. Yes, sir. We summoned him before the executive board and the executive board was assisting me, in other words, in making the investigation to find out just what was involved, and who involved with; I also contacted all the people as far as I knew, who had anything to do, or could have had anything to do with Mr. Borden's complaint.

Q. All right. You summoned him before the executive board?

A. Yes, sir.

Q. And what happened at that executive board hearing?

A. The executive board tried to determine just what Mr. Borden's complaint was and asked him why he was going outside the channels of the UA, why he didn't seek recourse within the framework of the constitution and the local union.

Q. Were they fully advised as to what Mr. Borden's complaint was?

A. They had the letter made available to them by myself, plus the fact that I had contacted some people and had part of the story and then we wanted to complete the story with Mr. Borden's testimony.

Q. Did Mr. Borden testify at that hearing?

A. I wouldn't call it a hearing in an ordinary sense because Mr. Borden didn't have too much to expound on other [fol. 248] than the fact he had gone to a lawyer and he was going to follow in that course of action. Now so far as a hearing was concerned, and what the executive board did in detail—

Q. The question was, did Mr. Borden not necessarily testify, but did he tell the board what his complaint was?

A. I am sure that he did.

Q. All right, and what action did the board take with regard to his complaint, the executive board?

A. Well, they also had the other people who are involved, the other principal in the case, Mr. Lanham. Mr. Lanham denied Mr. Borden's allegations.

Q. All right, let me ask you this one other question before you go on. In the event that Mr. Borden's accusations were true, Mr. Lanham would have been subject to disciplinary action on the part of the union, wouldn't he?

Mr. Wells: Excuse me, are you asking about allegations that he is now making or allegations that he was making then? I submit, the question isn't clear. The witness has said that Mr. Borden came in before the executive board and merely said I have a lawyer and he is handling it.

Mr. Klein: I will withdraw that question, Your Honor.

Q. Didn't you also say that you feel sure Mr. Borden told the executive board what he was complaining about?

[fol. 249] A. But I didn't have an opportunity to explain through the counsel the fact that I did not stay in the room during the course, the entire course or the entire time that Mr. Borden was there.

Q. Did you hear Mr. Borden explain what he was complaining about?

Mr. Wells: If the Court please, that calls for a conclusion as to whether or not he explained a complaint. Let the witness testify what happened, the facts.

The Court: I think that is well put.

Q. All right. What did happen while you were in the room where the executive board meeting was held?

A. May I back up for a minute and explain just what this is all about?

Q. Yes.

A. The executive board has the power to investigate. The executive board is the agent through which charges and grievances are heard in a local union as explained in our constitution. Other parties do not sit in on a hearing any

more than in here. Other parties do not come into this court. The executive board makes its investigation or in the case of formal charges, which are written, there are ten days notice to witnesses, outside parties, other people not directly connected with the event are not allowed in the room. Now as far as this particular case is concerned, and [fol. 250] this particular recollection, I presented what I knew of the case, including the letter to the executive board. Mr. Borden came before the executive board and then they carried it from there. I was not in the room.

Q. All right, do you know what action the executive board took on Mr. Borden's complaint?

Mr. Wells: I object to that until it is first shown what complaint Mr. Borden made to the executive board. His own testimony was that he told them it was in the hands of his lawyer.

Mr. Klein: Your Honor, he testified that he presented the letter from the attorney, he knows—

The Court: I will let him answer the last question.

A. Repeat the question, please?

Q. Do you know what action the executive board took on Mr. Borden's complaint?

A. The executive board cited Mr. Borden Section 27 of the local constitution and asked him to withdraw his complaint and go through local procedure and follow the framework of the constitution with his complaint rather than go to court and take it outside of the framework of the United Association.

Q. All right. Mr. Galvin, you referred a number of times to the procedure that a union member can go through within the framework of the constitution of the UA in order to [fol. 251] obtain redress for any grievance he might have. Would you tell us what provision of the constitution affords any remedy for being not allowed to go to work?

A. A man can take his complaint directly to the man he has the complaint with, a man can take his complaint directly to the executive board or a man can take his complaint directly to the membership in a regular meeting.

Q. All right, if he has already been deprived, we will say, of six months work by virtue of the wrongful act on the part,

of the business manager or the business agent, what relief can he obtain from the membership or the executive board?

A. Well, it is rather unusual and rather unique to hear of anybody letting something go in the way of losing his livelihood for six months and then come in and try to complain about it. The construction industry is so composed that I know very few people who would wait around for six months for getting a job.

Q. All right. Mrs. Steed, will you read the question back, please?

Q. (Reporter reading) All right, if he has already been deprived, we will say, of six months work by virtue of the wrongful act on the part of the business manager or the business agent, what relief can he obtain from the membership or the executive board?

[fol. 252] A. What relief he can have?

Q. Can he get his money back that he lost by virtue of not being employed?

A. Are we speaking of a specific instance, or just generalizing?

Q. Well, let's just generalize; I am just asking whether or not there is any provision in the constitution to reimburse a man if he lost six months work by virtue of the action of the business agent or business manager?

A. There is a possibility that if the man can justify and clearly establish his complaint and the executive board might assess a penalty to that extent, or the membership may see fit to assess a penalty to that extent.

Q. Is that provided for in the constitution?

A. It is not provided specifically for.

Q. So there is no remedy provided for in the constitution for that situation, is there?

Mr. Wells: Well, now, we object to calling for a conclusion of the witness and testing the witness.

The Court: I will let him answer if he knows, whether there is or isn't.

A. So far as I know, in the constitution there is no provision for paying a man for time lost or some such. No, I don't know of any provision.

Q. In other words, the only thing Mr. Borden could have [fol. 253] done if he had pursued the usual procedure

through the framework of the constitution would have been to punish Mr. Lanham, isn't it?

A. If he had taken that action immediately following the events which he alleges, I am sure it would have been settled one way or another immediately, not one year later.

Q. In other words, the only thing he could have obtained by going through the usual procedure through the framework of the constitution would have been to punish Mr. Lanham, wouldn't it?

A. It is possible he could have received remuneration.

Q. Do you remember when your deposition was taken in this case, Mr. Lanham—Mr. Galvin?

A. Yes, I do.

Q. Page 70.

A. Yes, sir.

Q. Line 4.

A. Yes, sir.

Q. Will you start reading on Line 4 please and read to the jury what you said at the time your deposition was taken?

A. (reading) "Question: In other words, all he could have done was punish Mr. Lanham?" And the answer is, "Yes".

Q. Would you read the next question, please?

A. (reading) "Question: He could not have gotten any [fol. 254] money out of the union, could he? No."

Q. Now, Mr. Galvin, you were a member of the executive board during 1953?

A. Yes, sir.

Q. You heard Mr. Zuefeldt's testimony here yesterday?

A. Yes, sir.

Q. With regard to certain members of the executive board instructing Mr. Lanham not to accept clearance cards?

A. Yes, sir.

Q. Do you remember any such instructions?

A. That came up from time to time, just what he had reference to, I don't know. I do recall that in June of 1953, when we anticipated a strike, the executive board took the normal procedure of advising the business manager not to accept any clearance cards until after our negotiations were settled.

Q. And that is the only time you remember the executive board instructing Mr. Lanham not to accept clearance cards?

A. That is correct.

Q. Were you ever present when Mr. Mullally talked to Mr. Lanham about refusing to accept clearance cards?

A. I couldn't say I was, I couldn't say I wasn't, I don't remember.

Q. What were the usual hours of work during 1953 and 1954?

[fol. 255] A. You mean on the job for business agents or are you talking about the journeymen?

Q. I am talking about the men on the job.

A. 8:00 to 4:30, 12:00 to 12:30 is the lunch hour.

Q. Eight hours a day?

A. That is correct.

Q. Five days a week?

A. Yes, sir.

Mr. Klein: We have nothing further, Your Honor.

Cross examination.

By Mr. Wells:

Q. Mr. Galvin, you have testified as I understand you, that in September of 1953 you were already a member of the executive board, is that right?

A. Yes, sir.

Q. Now who was the executive board in September of 1953?

A. Myself, B. J. Watkins, R. L. Weir, L. A. Garner, and John Cullum, who was vice president and chairman of the executive board.

Q. There were five members of the executive board?

A. Yes, sir.

Q. Including the vice president, who is ex officio member of that board?

A. No, the vice president is the chairman of the executive [fol. 256] board and he breaks any ties that may arise.

Q. Now did you know Mr. Borden in September of 1953?

A. No, sir.

Q. Did Mr. Borden bring any matter before the executive board during the year 1953?

A. No, sir.

Q. Did you serve on that executive board all the while from September 1953 up until January of '54?

A. Yes, sir.

Q. Did you attend the union meetings during that period?

A. Yes, sir.

Q. I am talking now about the general membership meetings of the body; did he bring any matters to the floor of the meetings during 1953?

A. I don't remember any such thing.

Q. All right, sir, now you took office on or about January 1st, 1954?

A. The first Monday in January, probably.

Q. How often did the union itself, the full body meet?

A. First and third Mondays.

Q. Twice a month?

A. Twice a month.

Q. And how often did the executive board meet?

[fol. 257] A. We met in between meetings as specified in the constitution. We met on the second and fourth Thursdays.

Q. And as far as you recollect, were those regular meetings of both the body and the executive board held during 1953 from September on?

A. Yes, we had regular meetings right along.

Q. Now if a member wants to file charges against a business agent for discrimination, is there a provision in the constitution by which this can be done?

A. Yes, it is outlined in the constitution.

Q. Just briefly, without going into all the lengthy language in the constitution, will you tell this jury what a member would do if he felt that a business agent had discriminated against him?

A. Any man with a complaint against another man cites the violation on a little form we have made out, we call them charges. The charges are written up and they go before the membership.

Q. Now how do they go before the membership?

A. They are read before the membership. The members then usually make the motion, I have never heard it otherwise, that the charges take the usual course.

Q. What does that mean?

A. That means they are referred to the executive board to be heard on a date as specified by the executive board in [fol. 258] order to provide a minimum of ten days notice to both parties in the case allowing for them to call their witnesses and summons their witnesses before the executive board at the time of their case.

Q. Does the executive board, assuming charges have been filed, presented to the body and the motion made to take their normal course, does the executive board then act somewhat as a court, hearing both sides of the controversy?

A. The executive board hears both sides and all witnesses to both sides and weighs the evidence and makes a ruling or recommendation based on the evidence presented and citing the violations, if any exist, and then they write up their findings as a recommendation back to the membership, which is heard at the meeting which would follow that executive board meeting.

Q. And does the membership then act upon that action of the executive board, either to approve it or to disapprove it or to modify it?

Mr. Klein: Your Honor, we are going to object to him leading the witness.

Mr. Wells: I believe it is leading. I thought I was saving time. I believe that is a good objection.

The Court: All right.

Q. Would you just explain that please?

A. The executive board book and the readings of [fol. 259] everything that takes place between regular meetings is read to the membership at the regular meeting and it is a definite and specified part of the regular meetings. You can't have a regular meeting without having the executive board book read, and in that you would include your recommendation one way or another, on the specific charges.

Q. And then does the body act on the executive board's recommendation one way or the other?

A. The membership has to approve or disapprove the action of the executive board; the executive board can only recommend.

Q. All right, now, if the executive board has, well, in this instance, if Mr. Borden had filed charges and they had come to the body, then moved that they follow the regular course and gone to the executive board for a trial, and the executive board, let's assume, had found Mr. Borden was right, and Mr. Lanham had discriminated against him, what could the executive board have done at that point?

A. The executive board could penalize Mr. Lanham and also direct Mr. Lanham to place Mr. Borden on the job if an opening still existed.

Q. And that would—well, as a matter of fact, couldn't they go so far as to direct Mr. Lanham to make Mr. Borden whole for whatever he had lost?

A. Well, that is what I say, they could penalize Mr. [fol. 260] Lanham.

Q. Now that however, would have to come back to the body to be acted upon, either approved or rejected?

A. That is right.

Q. Now let's assume that either Mr. Lanham or Mr. Borden, who lost it there, was unhappy with it, was there anything else he could do?

A. He can appeal his case.

Q. To whom?

A. To the general headquarters, in a case such as that, why then the headquarters will send in the general organizer to hear the appeal, if—

Q. This would be a general organizer directed in by the general president in Washington to come in and hear the appeal?

A. That is correct.

Mr. Smith: Your Honor, we object to his leading the witness and counsel testifying.

Mr. Wells: I thought I was saving time, I am sorry. I think that is a good objection.

Q. Would you just go ahead, Mr. Galvin, and just as concisely as you can, tell the jury what the procedure is through the union trial process?

A. The general organizer could be sent in by the general president and then he would hear, have a rehearing, and [fol. 261] hear the appeal, hear both sides again, and he would make his recommendations then to the general president. If the man had been turned down on his appeal, and wanted to appeal further, he could appeal to the general convention of the United Association at the next or ensuing convention.

Q. Actually, those conventions are held at what intervals?

A. Every five years.

Q. And so if Mr. Borden had to wait for a convention, he would have to wait from 1953 to 1956, is that correct?

A. August 1956 was our convention, that is right.

Q. Was there any time limitation—was there any time factor involved in the appellate process, up to the present, though?

A. No, he could appeal immediately.

Q. It is only if it went against him before the executive board, the local union, the general organizer and the general president before it would even be up to him as to whether or not he wanted to take it to the convention?

A. That is correct.

Q. Does the trial process also provide for any other body to pass upon it, what about the general executive board of the U A, of the International?

A. Well, appeals, on first appeal, might be to the general executive board rather than the general president, I don't [fol. 262] remember that specifically.

Q. Whatever the constitution says, will cover that?

A. I only remember one instance going through the general convention. Most appeals were settled by the general organizer, very seldom that anybody appealed beyond that.

Q. Now Mr. Galvin, you have outlined a procedure here without being absolutely specific and what is your best recollection as to whether or not such procedure was used by others in connection with any complaints or controversies they had with the local union; did you as an executive board member actually see this process at work?

A. Yes, sir, I saw both, as an executive board member and as a financial secretary, I had to write some checks and

return some money, when the fines were not upheld on appeal by the general organizer.

Q. All right, sir, is there any reason why the procedure you have just indicated would not have been open to Mr. Borden?

A. No, sir, that is available to every man in the UA.

Q. All right, sir, now let's assume that for some reason he did not want to file charges of discrimination against Mr. Lanham, but he still thought that the union owed him some money. To whom do creditors of the union present bills for payment, how does the union handle that?

[fol. 263] A. Well, they come into the business office and then they are referred to the membership as a whole for acceptance and okay for voucher in order to write the check.

Q. Was there another member who made a claim represented by this very same law firm who did present a claim to the membership on the floor?

A. Yes, sir.

Q. Did the membership take a vote on that claim?

A. Yes, sir.

Q. Would it have been open to Mr. Borden, if he didn't want to follow the trial procedure, and if he had a claim, to present it on the floor of the local union?

A. Yes, sir.

Q. And did he ever present it on the floor of the local union?

A. No, sir.

Q. All right, sir, now counsel was using the word complaint to you when he was talking to you about your conversation with Mr. Borden sometime in the spring of 1954. Did Mr. Borden ever ask you to pay him any money?

A. No, sir.

Q. Did he ever ask you to send him out on any particular job?

A. I don't recall anything particular along that line. I do remember talking with Baldy about working on a lead [fol. 264] bench and we arranged for him to work on the lead bench there on the Texas Plumbing job.

Q. Did he ever file any written complaint on the form you have talked about?

A. No, sir.

Q. Or make any communication to the union seeking recompense or seeking a job on the Republic Bank Building while you were in office to your knowledge?

A. Not that I recall. Just as I said, it was just an ordinary conversation.

Q. And if it occurred as he said it occurred back in September of 1953, it was not until August or September 1954 that the local had any knowledge about it through this letter from the lawyer?

A. That is right.

Q. Now you have named for us the executive board members in 1953, when you were a member of the executive board. Was that the same executive board in 1954?

A. No, that was an entirely new executive board.

Q. How are executive board members selected?

A. They are not selected, they are elected by the membership every two years at the same time the business manager and secretary and everybody else is elected.

Q. Well, are they full time officials of the union? Who is the executive board?

[fol. 265] A. There are no full time officials of the union except the business manager and the business agent.

Q. The executive board is just rank and file people who work with their hands all day and come to an executive board twice a month at night, is that it?

A. That is correct. All elected officers outside of the business manager and business agent served without any compensation whatsoever and put their time in with the local, and in the evenings and on the weekend, as their own time.

Q. All right, now who was the executive board in 1954?

A. Bill Monroe was vice president and chairman, he is now deceased; B. J. Pierce, Eddie Lowry, Odell Sanders, and O. F. King.

Q. Were they all rank and file members of the local union here in Dallas?

A. They are all qualified journeymen, yes, sir.

Q. Now counsel referred you to your deposition here, what was that, page 70, where he asked you the question, "He could not have gotten any money out of the union,

could he?" and your answer was "No"; was that in a context where he was asking you about the charge procedure as distinguished from coming on the floor of the local union and presenting a bill to the local?

[fol. 266] Mr. Klein: Now, Your Honor, we are going to object to that question, if counsel thinks I have taken it out of context, he can ask the witness about it.

Mr. Wells: That is what I was trying to do.

Mr. Klein: That calls for a conclusion on the part of the witness.

The Court: I will let him explain his answer, if that is what he is attempting to do.

By Mr. Wells:

Q. Would you do that, please, sir?

A. I believe we went over this once before, in that deposition there, and I made it clear that somebody just coming around and asking for money, they weren't about to get it; however, if a man took his case before the membership, there is no limit on what the membership could do. If the membership saw fit to meet the man's demands and thought he had a grievance there, there is nothing that says that they cannot authorize the financial secretary to pay him whatever they see fit.

Q. Now approximately how many members were there of the union in 1954?

A. I had a book membership of around 750 or 800.

Q. What were the facts with reference to whether or not there was full employment during the time you were business manager?

A. The count of the number of unemployed I had on my [fol. 267] hands within the first two weeks is over 60 men unemployed, that was local members unemployed.

Q. That would be within the first two weeks of January 1954?

A. That is correct.

Q. Now would you go on and include the rest of the year to the best of your ability and tell this jury what the employment situation was during 1954, so far as this local's members was concerned?

A. Well, unfortunately, it got worse instead of better. In the spring we had well over 100 men unemployed. It wasn't until late fall in the year that employment picked up considerably and in December of 1954, we felt pretty happy because Christmas week we happened to have everybody working.

Q. Was it usual or unusual during your time of office to have everybody working?

A. I am afraid it was quite unusual while I was in office.

Q. When did it happen while you were in office?

A. In the latter part of the year, December of 1954, was the only time I had everybody employed.

Q. Now you have testified about a letter which you received from Mr. Borden's attorney, a different attorney then, an attorney named Mr. Hultgren, in August or Sep-
[fol. 268] tember of 1954. Did you make an investigation at that time?

A. I made an investigation and contacted the people involved as far as I could determine, and made a report to our general organizer and we also visited the lawyer who sent the letter.

Q. Well, in connection with your investigation, what were you trying to do?

A. We were trying to determine whether there was legitimate basis for a suit or whether—

Q. All right, sir, did—in that connection, who did you see in the investigation?

A. Directly or indirectly contacted the supervision of the Republic Bank job.

Q. And who was that?

A. And other people of the Farwell Company. Well, specifically, Mr. Heath, who was the superintendent.

Q. Who else?

A. Later on I talked to Mr. Thurman.

Q. That is A.—

A. A. G. Thurman.

Q. —G. Thurman? All right, did you contact somebody at the office to see what the Farwell record showed?

A. Yes, sir, I contacted the Farwell Company to find out their policies, et cetera.

Mr. Wells: If the Court please, I believe Defendant's [fol. 269] 1 was not offered; the record may erroneously show its wholesale acceptance in evidence, I don't believe it is properly in evidence up to this point.

Q. I now hand you Defendant's Exhibit 1. Is this a letter which you received from the Farwell Company in the course of that investigation in September with respect to Mr. Borden's work record with Farwell?

A. Yes, sir.

Q. Actually, this particular letter was received at a later date, was it not, or was it misdated—I see it is dated September 8, 1955?

A. Well, I spoke to people at Farwell on several different occasions pertaining to this, following which a telephone conversation as noted here in this letter, I don't remember which one.

Q. Do you know Mr. Billy R. Carter with the Farwell Company?

A. Yes, I have met him.

Q. And on occasion, have you had correspondence with him sufficiently to know the authenticity of his signature?

A. No, that is about the only correspondence we have had, it was mostly over the phone or in person.

Q. Did the receipt of this letter on the letterhead of the Farwell Company come in sequence in relation to a telephone call?

[fol. 270] A. Yes, sir.

Q. What was the nature of that phone call?

A. Billy was taking care of the payroll section of the records there at Farwell Company and I asked him for the specific dates in which Mr. Borden had been employed by the Farwell Company.

Q. Did you thereafter receive this Defendant's 1?

A. Yes, sir.

Mr. Wells: We offer it in evidence. It is the same one that was here yesterday.

Mr. Klein: Your Honor, we object to it on the basis that it has to do with a period of time prior to anything that is involved in this particular lawsuit; it is immaterial and irrelevant.

Mr. Wells: There is no objection on the basis of its authenticity then?

The Court: Sir?

Mr. Wells: I was inquiring of counsel as to whether or not there was any objection on the basis of authenticity.

The Court: I think the objection is good on hearsay perhaps.

Mr. Wells: If Your Honor please, I don't believe he made that objection.

The Court: He made that objection—he objected generally and I think the objection is good. Sustain it.

[fol. 270-A] Mr. Wells: Note our exception.

Q. Did you ascertain from the Farwell Company what their records showed with respect to Mr. Borden's work history?

A. Yes, sir. That didn't follow in any particular dates because we didn't know what dates it pertained to in reference to Mr. Hultgren's letter, we didn't get into specific dates until a later date.

Q. I see. Now I believe you were testifying about this investigation you made upon receipt of Mr. Hultgren's letter and you said you inquired of Mr. Heath. Was Mr. Heath at that time still employed by Farwell?

A. He was still employed by Farwell as the superintendent of the Republic Bank job, yes.

Q. Where did you converse with him?

A. On the job in his office.

Q. Who was present?

A. I was with the general organizer, Jeff Mullally.

Q. What conversation was had between the three of you at that time?

Mr. Klein: We are going to object to that as hearsay.

The Court: Sustain it.

Mr. Wells: If the Court please, may I approach the bench?

[fol. 271] The Court: Yes, sir.

Mr. Wells: There is an allegation here which the Supreme Court says is essential as to ratification. Now on that issue, what investigation was made, and what report was made, is, we think, quite relevant, on whether or not it

may be admissible for the purpose of proving the truth, or falsity of the facts, which Mr. Heath himself uttered; the fact he told the union whatever he told them is quite relevant on the issue of ratification. He is going to testify that Mr. Heath told him he had not known Mr. Borden and that he did not call for him.

Mr. Klein: He is dead, Judge.

Mr. Wells: He is further going to testify that he was told that Thurman had no authority to call for him.

Mr. Smith: In other words, Your Honor, they are trying to prove their case by hearsay statements of a dead person.

Mr. O'Donoghue: If I might say something with respect to ratification, they must show that we had knowledge of all the material facts.

The Court: In respect to who?

Mr. O'Donoghue: Regarding Borden. Now, if the union acted on another set of facts, whether true or false, they have not proved their case. We are not offering this for the truth of it, but for the mere fact he was told this [fol. 271-A] and he acted upon it.

Mr. Smith: Your Honor, we have no objection to who they talked to or what they did after they talked to them, but we seriously object to anything that was said—to any testimony of what was said as being hearsay as to our client.

Mr. Wells: Judge, their theory is, if I understand their theory, that we ratified what Lanham did. Now if we ratified it, we had to know what he did and we had to know what the facts are. We say on the issue of ratification we are entitled to show what the union did or didn't do and the factual basis on which they did it or didn't do it. Now they may have acted on erroneous information, I don't know, or it may have been the gospel truth, they acted on some information which was assembled by this man and he is a live witness here testifying what information he assembled and what report he made.

The Court: I believe it is good, I sustain it.

Mr. Wells: Note our exception.

Mr. Wells: Judge, can you send the jury out and make our bill now or can it be taken on the statement of what he would testify?

The Court: I assume he would answer as you have indicated, I think she has it down, I think that would cover it for the purposes of the record.

By Mr. Wells:

Q. Mr. Lanham, did you discuss this situation with—I [fol. 272] said, Mr. Lanham, I mean, Mr. Galvin. Did you discuss this situation with Mr. Heath?

A. Yes, sir, I did.

Q. Did you report to the executive board what Mr. Heath told you?

A. Yes, we did.

Q. As a part of your report of the investigation?

A. Yes, sir.

Q. Now did you also talk with Mr. Lee Roton?

A. I didn't see Mr. Roton in person, we contacted him by phone.

Q. And who was Mr. Roton?

A. Lee Roton was superintendent of the Veterans Hospital job for Farwell Company and he had been superintendent of the hospital job in Galveston.

Q. Now, to your knowledge, did Mr. A. W. Thurman ever make a requisition for any man on the Republic Bank job?

Mr. Klein: You mean A. G. Thurman?

Mr. Wells: A. G. Thurman, your witness yesterday.

A. What period are you talking about now?

Q. Any time?

A. In 1954?

Q. '53 or '54, of which you have knowledge?

A. I don't remember ever talking to A. G. about any man at all on that job.

[fol. 273] Q. Who did make the requisition for any men who would be called for on that job?

A. My contact was with Grady George, with the steam fitters, and Jack Heath for the plumbers.

Mr. Wells: That is all, thank you Mr. Galvin.

Cross examination.

By Mr. O'Donoghue;

Q. Mr. Galvin, this contract which you were shown, who is that contract between?

A. Mechanical Contractors and the Local 100, I assume that is the one you have there.

Q. This is the 1953 contract?

A. Yes, sir.

Q. United Association is not a party to this contract, is it?

A. No, sir.

Q. In fact, the United Association is not a party to any of the local union agreements, is it?

A. No, they are made locally between the contractors locally and the union locally.

Q. Is collective bargaining, negotiations, agreements, that is within the authority of the local union?

A. Yes, sir.

Q. Do you receive any directions or instructions from [fol. 274] the International about negotiating agreements?

A. No, sir.

Q. Is your agreement ever approved by the International?

A. No, sir.

Q. In other words, the International doesn't have any knowledge about the particular agreement a local union has negotiated, it doesn't participate in it?

A. They don't participate in it. The only way they are involved at all is when we file the Bacon-Davis Act filed in Washington.

Q. Now, Mr. Galvin, you testified that during 1954, you had some conversation with Mr. Borden. Did you ever bring those conversations to the attention of Mr. Mullally, the general organizer?

A. Not until after I had received that letter from Lawyer Hultgren.

Q. And when was that?

A. In August or September of 1954.

Q. Was a copy of that letter—did that letter show a copy was sent any place?

A. Yes, sir, he had received the same word.

Q. In other words, a copy had been sent to the United Association?

A. Yes, sir.

[fol. 275] Q. Now Mr. Galvin, how would a local union obtain the services of a general organizer?

A. By contacting general headquarters.

Q. You would have to contact general headquarters?

A. Yes, sir.

Q. That would be in Washington?

A. Yes, sir.

Q. All right, could you call the organizer direct?

A. Very often we did, yes.

Q. And then did you send a telegram to International?

A. If we wanted the organizer to come in for a direct assignment we usually contacted headquarters and asked for his services and then they would assign him to the local for the particular assignment.

Q. There is a special constitutional provision regarding that, is there not?

A. I don't recall offhand which one.

Q. I direct your attention to Section 38, would this refresh your memory?

A. Yes.

Q. Would you read that provision to the jury?

A. (reading) Section 38. "When locals desire the services of an organizer, they must give full information of the need of the services to the general president who shall give his judgment as to the advisability of the request at [fol. 276] the time."

Q. Now another provision also provides that you are to specify in detail to the general office the problems that you have that you want help on?

A. Yes, sir.

Q. Section 31. Did the local union, do you know, ever write to the general office while you were an officer concerning this Borden case?

A. I don't imagine that took place, any writing to headquarters on the Borden case, until after I had left office.

Q. Now Mr. Galvin, there has been some testimony here that an officer can be charged for discriminating against

members. There is a specific constitutional provision on that, isn't there?

A. Yes, discrimination is a very serious charge.

Q. Would you read Section 81, 181 to the jury?

A. (reading) "Section 181, entitled Unjust Discrimination of Members. Any officer or member of the United Association found guilty of unjust discrimination of members of the United Association because of their affiliation or non-affiliation with fraternal societies or otherwise wherein such unjust discrimination causes members to lose their employment or are not able to secure employment, these aforesaid guilty officers and members shall be disciplined by [fol. 277] either assessment, suspension or expulsion from the United Association in accordance with Sections 183, 184 and 185."

Q. Now this Section 183, 184 and 185 specify the trial procedure, do they not?

A. Yes, sir.

Q. And that is the trial procedure that you have briefly gone over with Mr. Wells?

A. Yes, sir.

Q. Now there was some confusion, I believe, about that: an appeal is taken, is it not, from the local union to the general executive board and not the general president?

A. That is correct; I stand corrected on that.

Q. Now after you and Mr.—you received a copy from the attorney in September, August or September of 1954, did you contact Mr. Mullally or did he contact you?

A. Offhand, I don't remember whether Jeff called me or I called him, and he mentioned to me the date he would be over for the follow-through on the letter he had from headquarters, and we made the arrangements to make our investigation, including a visit to Mr. Hultgren's office; we contacted him, too.

Q. Well, when Mr. Mullally came over, you have testified you went out to the job site to see Borden. Now at that time, what did Borden say to you?

A. I don't remember specifically what he said. I remem- [fol. 278] ber him telling Jeff that he was going to leave it in the lawyer's hands.

Q. And what did Mr. Mullally say in reply?

A. Mr. Mullally told him if he was going to use a lawyer, that he was going to stay out of it, that he couldn't compete with these boys with college educations, or something to that effect.

Q. Now at that point did the conversation terminate?

A. Oh, pretty much, a few pleasantries and we left. At the same time we were out there, myself and the business agent, was showing the organizer around the job, because of the type of job it was.

Q. Now Mr. Mullally was not at this executive board meeting, was he?

A. No, sir.

Q. In fact, he left Dallas the following day, didn't he?

A. Yes, sir.

Mr. O'Donoghue: I think that is all.

Redirect examination.

By Mr. Klein:

Q. Now, Mr. Galvin, you have given us a fairly detailed description of the appellate procedure after the matter is referred to the executive board. Now this appellate proce- [fol. 279] dure that you are talking about, that is Section 187, is that correct, and the sections immediately following?

A. Yes, sir.

Q. Would you read to the jury what that appellate procedure is, would you read that Section 187?

The Court: We will take a ten minute recess.

(Reporter's Note: Court reconvened following the recess at 11:05 a.m. at which time the following proceedings were had in the presence and hearing of the jury:)

JOHN GALVIN, being recalled, testified further as follows:

Redirect examination.

By Mr. Klein:

The Court: All right, proceed, gentlemen.

Q. I believe, Mr. Galvin, you were about to read Section 187 with regard to appeal, to the jury.

A. Appeal, Section 187. (reading) "Appeals against the action of Local Unions in assessing, suspending or expelling members may be taken to the general executive board providing such an appeal is made within 50 days from the date upon which the local union took final action on the case."

Q. All right, now, Mr. Galvin, this is the appellate procedure that you explained a moment ago in answer to Mr. Wells' questions, is that correct?

[fol. 280] A. Yes, sir.

Q. And as far as you know there is no other appellate procedure in the constitution?

A. No, it is outlined in the constitution. There is nothing else outside of the constitution.

Q. All right, and this Section 187 is the only appellate procedure outlined in the constitution?

A. Yes, sir.

Q. All right, now, Mr. Galvin, would you explain to us what the local union does when it assesses—what I am getting at, it says appeals against the action of the local union in assessing, suspending or expelling, may be taken to the general executive board. Now, I want to know what assessing means?

A. Assessing, as far as the meaning and intent here, as I understand it, is after the executive board finds a man guilty of violation of the constitution, and they recommend an assessment and go before the membership as a whole and they approve of it and uphold that assessment in whatever amount it might be, that assessment is for the man to pay.

Q. Well, it is in the nature of a fine, isn't it, Mr. Galvin?

A. You might call it that, yes.

Q. For instance, if someone gets up on the union floor

down there and does something out of order, the president [fol. 281] can assess him a certain sum of money?

A. Yes, sir.

Q. Or if he does something wrong on the job, against the union constitution, the local union or the executive board can assess him or fine him a certain amount of money?

A. Providing they follow the procedure as outlined so far.

Q. Right. And when that man is assessed that money, he can then appeal under this provision?

A. Yes, sir.

Q. Now would you explain to us what suspending means?

A. A man's membership would be suspended.

Q. For instance, if he does something against the constitution, the executive board can suspend him from membership in the union, is that correct?

A. You are speaking of, when you say it that way, as a distinction to be drawn between suspension and expulsion.

Q. I understand, and that is what I want you to explain to us, what is suspension?

A. Suspension would indicate that his rights and privileges under the constitution will be denied for a certain period of time.

Q. All right, then the next thing it says, appealed against the action of local union in assessing, suspension or expelling. Now what does expelling mean?

[fol. 282] A. Expelling means that he would be expelled from the local union.

Q. That means put clear out of the union?

A. Yes.

Q. All right, now you have testified that this is the only appellate procedure contained in this constitution?

A. Yes, sir.

Q. Now which one of those three categories would a deprivation of a right to work fall in?

A. That would follow a set of charges.

Q. No, I am asking—

Mr. Wells: Let him answer, please.

Mr. Klein: All right.

A. That would follow a set of charges and found somebody guilty and then the person found guilty to appeal.

Q. In other words, you are saying that if Mr. Borden had filed a complaint against Mr. Lanham and Mr. Lanham had been assessed a fine or whatever you wish to term it, Mr. Lanham could have appealed, isn't that what you are saying?

A. That is correct.

Q. What could Mr. Borden have done if Mr. Lanham had refused his claim?

A. Well, it wouldn't be a—repeat that question, please?

[fol. 283] Q. All right, Mr. Borden goes before the executive board, he goes before Mr. Lanham, and tells them they have deprived him the right to go to work on the Republic Bank job. They tell him they are not going to put him on the Republic Bank job because they don't like his bald head. Now who does he appeal to?

A. I am assuming that your intention is that he has brought charges and brought witnesses before the executive board and gone through the regular procedure?

Q. Right.

A. Mr. Lanham, of course, has his right to bring his defense in and if Mr. Borden cannot prove his case, then Mr. Borden would be denied.

Q. Mr. Borden would be denied by the executive board anything, then where would Mr. Borden go?

A. Then he has the right to appeal to the general executive board.

Q. Under what provision of the constitution?

A. That the hearing was, in his opinion, unfair.

Q. What provision is that of the constitution?

A. There was a trial—

Q. What provision of the constitution provides for that?

A. You would have to allow me some time to look that up.

[fol. 284] Q. I don't want to impose on the Court, but we have ample time for him to look it up, Your Honor.

Mr. O'Donoghue: I think the constitution speaks for itself; he has taken provisions of the constitution out of context; there are a lot of provisions in the constitution that are interrelated. Now he has cited one provision here as the

only provision for appeal. As you notice, there is another provision for protest, there are other provisions to take care of this thing, and I think the document itself speaks for itself.

The Court: I will let him answer, if he knows. I think that is about the effect of the question put to him.

Q. Do you know of any appellate procedure Mr. Lanham could have gone through—I mean, Mr. Borden?

A. I know that if he had registered his complaint with headquarters that he had been denied his rights, that they would have assigned a general organizer in here to hear an appeal on the case.

Q. But that is not provided for in the constitution, is it?

A. The biggest part of the general organizer's job is to hear individual cases.

Q. But that is not provided for in the constitution, is it? Well, in the interest of time, Mr. Lanham—Mr. Galvin, I am sorry—if the Court will permit, I will go on to another [fol. 285] point at this time and if it is agreeable with the Court, we will allow you to study the constitution over during the other witnesses' testimony and then I will recall you for the purpose of showing the provision whereby Mr. Borden could have appealed.

Now, you testified a moment ago that you did not hear Mr. Borden's name brought up during 1953 or the early part of 1954 at any executive meeting or at any general meetings. I believe you said you did not remember hearing it brought up?

A. That is correct.

Q. Did you attend all of those meetings, Mr. Galvin?

A. Yes, sir.

Q. And are you testifying that Mr. Borden's name was not brought up or that you just don't remember it being brought up?

A. I suppose there is a possibility, but I don't remember ever hearing the man's name at any time during that period.

Q. But you are not stating positively that his name was not brought up either at the executive board or the general meeting?

A. It would be impossible for me to say one way or another, I didn't know the man and didn't know anything about him.

Q. All right, now you said if his complaint was brought [fol. 286] before the executive board in 1953, that would have been in the minutes and those minutes would be read to the general meeting, is that correct?

A. If there was anything that took place before the executive board, I sat on the executive board and didn't miss any meetings, and he would have had to appeal before myself and the other members of the executive board.

Q. All right, if he had appeared, that would be in the executive board minutes, is that correct?

A. Yes, sir.

Q. All right, now those executive board minutes, as I understand the situation, are read to the general meetings and the only notation that is made in the minutes of the general meeting is that a report of the executive board was received and approved; you do not set out in full in the minutes of the general meeting what took place in the executive board meeting, do you?

A. It depends on how the executive board's recommendations are received by the general membership.

Q. But in most instances the general membership minutes simply provide that the executive board's report was received and approved, isn't that correct?

A. Well, very often it happened that way.

Q. Now where are the minutes of the executive board meetings for the year 1953?

[fol. 287] A. I have no idea.

Q. They are not down at the union hall, are they?

A. If they are not there, then I certainly have no idea where they are.

Q. You do not know whether or not they have been lost?

A. No, no, I don't know, that is too long ago.

Q. Now you made a statement while you were testifying, while you were answering Mr. Wells' questions, that if Mr. Borden, immediately upon being denied the job on the Republic Bank had brought it to the executive board, the executive board could have told Mr. Lanham to put him to work on the Republic Bank if there was an opening, if there was, is that what you said?

A. I believe the way that was—I answered that question, was something to this effect—what could the executive board do if they had followed—if Mr. Borden had followed the regular procedure and then the executive board had found that Mr. Lanham was wrong and Mr. Borden was right, and I am assuming on that basis, because of the procedure involved, that it would have been a month later, and therefore, I qualified the answer as to placing him on the Republic Bank as to the availability of work, one month later.

Q. All right. But that is a fact, if he had gone through [fol. 288] the procedure and if they had found that Mr. Lanham had discriminated against him, then they could have ordered Mr. Lanham to refer him to the Republic Bank, if there was an opening?

A. Yes, sir.

Q. All right, sir, and if there was no opening, they couldn't have instructed Mr. Lanham to go over there and pull one of the men off of the Republic Bank and put Mr. Borden on, could they?

A. We were never in the position where we could impose on the employer anybody that came along. If the employer didn't have an opening, we couldn't ram them down his throat.

Q. All right, so if it were determined that Mr. Borden had been discriminated against and he should have been put on the Republic Bank, and there was no opening there by the time that determination was made, he still wouldn't have got on the Republic Bank, would he?

A. Not until the first opening.

Q. All right, but if there was no opening now, he wouldn't have got on the Republic Bank?

A. Under those circumstances, I suppose so.

Q. All right, now, you testified that you had seen other people appeal all the time that you had been down there at the union, and as financial secretary, you had even written [fol. 289] checks, what kind of checks were those you wrote?

A. Drawn on the general fund of the local union.

Q. And they were payable to a local union member?

A. Correct.

Q. And what were you paying them that money for?

A. Refund of over-payment of initiation.

Q. Did you ever pay them any money back on an assessment?

A. No, the usual procedure when a man appealed, he kept his dues up and he was allowed the right to appeal until such time the appeal was heard and a ruling made and if his appeal was upheld, why in the meantime, he hadn't paid his fine.

Q. All right. But the checks that you are talking about were checks of overpayment of dues or something of that sort?

A. Members who had dropped out and returned to the local and who had paid an excess initiation fee.

Q. Have you ever heard of a union paying anyone any money because they had been deprived the right to work?

A. Offhand, I can't recall any.

Q. Now when you were testifying when Mr. Wells was questioning you, you also said that the union, if they had found that Mr. Borden's charges were correct, could have assessed Mr. Lanham?

[fol. 290] A. Yes, sir.

Q. Who would have gotten that money they assessed against Mr. Lanham?

A. The local union.

Q. It wouldn't have done Mr. Borden any good, would it?

A. That is right, I think I also stated that the local union could disburse its funds as it saw fit.

Q. You mean, it could take up a collection among the members or something?

A. Not necessarily. By action on the floor it is within the discretion of the membership to do with their money as they see fit.

Q. All right, now, Mr. Wells also asked you if Mr. Borden ever asked you for any money. Would it have done any good for him to ask you for any money?

A. It wouldn't do any good to ask me for money.

Q. All right. Then does Section 181 that Mr. O'Donoghue had you to read a moment ago, that provides anyone found guilty of discrimination shall be disciplined by assessment,

suspension or expulsion from the United Association, that assessment goes to the local union?

A. Yes, sir.

Q. Now Mr. Wells intimated that I had taken your answer to the question of whether or not Mr. Borden could get [fol. 291] any money out of the local union out of context, so would you start reading at line 17, please?

Mr. Wells: What page are you on?

Mr. Klein: We are on page 69, I believe that deals with something wholly unrelated to getting any money, and read down to the top of page 71 and designate the questions and answers.

A. (reading) Line 17: "Answer: as far as I could determine. Question Number 18: Mr. Heath is dead? Answer Number 19: That is what I found out about an hour ago, I did not know about it before. 21. Question: You said that you made an effort to try to persuade Mr. Borden to go under the constitution and take his remedy in the union rather than go to court. What could he have done in the union? 25. Answer: If he could have found charges of discrimination, it is a very serious charge in a membership such as ours and the penalty can be quite severe on the man who does the discriminating. Question: In other words, all he could have done was punish Mr. Lanham? Yes. 7. Question: He could not have gotten any money out of the union, could he? Answer: No. Question: In other words, if he had been out of work for four or five months as a result of that discrimination, that was just money out of his pocket. 13. Answer: If such was the case, however, it was not the case. 14. Question: I understand your contention that it [fol. 292] was not the case, but if it was the case, he could not have gotten any money? 16. Answer: Not that I know of. Question: 17. So all that the local union could have done was punish Mr. Lanham and by that time Mr. Lanham had already been defeated in the union? 20. Answer: At the same time present enough testimony to the people as to whether or not there was discrimination, so any redress should have been between the two people who were both members in the same organization. Question: That would not have put any money in Mr. Borden's pocket? Answer: Mr. Borden, as far as the investigation of the executive

board could determine was sent out to work so he did not lose any money."

By Mr. Klein:

Q. I believe that is the end of that particular line of questioning, isn't it?

A. I don't know.

Q. Well, go ahead and read the next few questions.

A. Pertaining to that, yes.

Mr. Wells: Where did he stop?

Mr. Klein: Page 71 at line 2.

Mr. Wells: You are still talking about charges or discrimination on question 2. I will get it later.

Mr. Klein: All right, we have no further questions, Your Honor.

[fol. 293] Recross examination.

By Mr. Wells:

Q. Would you keep going, please, Mr. Galvin, from wherever you started and go on down to page 72, to the top of 73?

A. (reading) Line 3 page 71: "Question: What do your records reflect down there with regard to when Mr. Borden was sent out to work after his clearance card was accepted? Answer: I cannot answer that. Question: Would your records down there show? Answer: When he went to work? Question: Yes. Answer: If they have kept those records, they would indicate the date that he went to work. Question: If the union has not thrown them away, they will show the date that he went to work? Answer: It is not unusual to keep records for five or six or seven years, as to when a man—"

Mr. Wells: It is not usual.

A. (reading) "It is not usual to keep records for five or six or seven years as to when a man is assigned to what job. There is no good purpose for it, it is just an accumulation of paper. I guess if you wanted— Question: Now this executive board meeting where you conducted your investigation and had a hearing and so forth, I believe you said

that you determined that there had been no discrimination? 22. Answer: Insofar as that particular meeting went, it was never carried through to a completion because Mr. [fol. 294] Borden said he was going to the courts rather than to follow any line of action that he might take within the UA. Question: Now you mean that the executive board did not make any decision? Answer: Well, there is a limit as to how much they can do under the circumstances. Question: In what way? Answer: In the first place, there were no charges of discrimination brought by Mr. Borden. I believe that Mr. Lanham within the framework of the UA found that the only authority that the executive board had under those circumstances was to investigate and to try to determine the facts and there was no specific charge; in other words, within the framework of the UA."

Mr. Wells: Now, just a minute—well, go ahead.

A. (reading) "Question: How do you go about bringing a charge within the framework of the UA? Answer: You follow much the same approach as you would in a court. A specific charge brought as to the violations of the rules of the UA or of the local union involved. Question: Wasn't that done here? Answer: If charges are made, a notice of the charges is read on the floor, and approved by the membership. A specific date is set for a hearing; notice is sent to the witnesses involved, and this must be done within ten days and then that witness will then appear at the investigation before the executive board. Question: Wasn't that done here? Answer: No, sir. Question: What was done here—"

[fol. 295] By Mr. Wells:

Q. That is enough. It keeps going—now any place in that whole line of inquiry, was there any question asked about Mr. Borden presenting a bill to the local union or bringing the matter up on the floor or were you talking merely about the charges there in that line of questioning?

A. What I just read was just about charges.

Q. Now you rather smiled and laughed in response to one of counsel's questions when you said it wouldn't do any good to ask me for money, were you speaking of yourself personally, or of the union at that time?

A. I was speaking of myself.

Q. If Mr. Borden had filed charges, would they have taken the normal course provided in the constitution and the way you have testified?

A. Absolutely.

Q. If he had sought to raise the matter on the floor of the union, would he have been heard?

A. Yes, sir.

Q. Now with respect to the appellate—counsel asked you about some lost records. Did you lose any records?

A. No, sir.

Q. You left office there when?

A. I was defeated in December of '55 and I stayed over about two weeks in January, about the middle of January [fol. 296] sometime I left office.

Q. In '56?

A. That would be January '56, yes, sir.

Q. Were the records there at that time?

A. When I left the office, they were.

Recross examination.

By Mr. O'Donoghue:

Q. Mr. Galvin, you have testified the only appellate procedure in the UA constitution is Section 187. Now I direct your attention to Section 30. First, would you begin reading right there, it deals with the duties of the general organizer?

A. (reading) The general organizers of the association shall be under the supervision of the general president, assisted by the general secretary-treasurer, and shall have full power and authority to settle all disputes and grievances of any kind in or between local unions—

Mr. Klein: Pardon me, which section are you reading?

Mr. O'Donoghue: Section 30.

Mr. Klein: Which constitution are you reading—oh, we started way down there, I am sorry.

Mr. O'Donoghue: I was just trying to save time.

A. (reading) "The general organizers of this associa-
[fol. 297] tion shall be under the supervision of the general president, assisted by the general secretary-treasurer, and shall have full power and authority to settle all disputes and grievances of any kind in or between local unions, district counsels or state associations or between members and local unions, when directed by the general president, and they shall have full power and authority—"

Q. That is all right there, now, over here, Section 188, the second paragraph.

A. Section 188: (reading) "Appeals may also be taken from any decision or order of suspension or expulsion made by the general president or his representative or any organizer to the general executive board within sixty days and the decision of such board shall be final and shall be communicated to the interested party by the general secretary-treasurer and to the general president, such decisions of the general executive board shall be rendered."

Q. Now do you also have an appellate procedure dealing with protests against provisions of the constitution, do you not, Section 188?

A. I couldn't recall them offhand.

Mr. O'Donoghue: Well, this document will speak for itself.

By Mr. O'Donoghue:

Q. Now as a matter of fact, Mr. Galvin, don't general organizers spend most of their time deciding disputes that
[fol. 298] arise?

A. Yes, sir.

Q. Complaints that are made to the general headquarters?

A. Yes, sir.

Q. And the general organizer will get a telegram and come into the local union?

A. Yes, sir.

Q. And he will try to get the parties together?

A. Yes, sir.

Mr. Klein: Your Honor, we have been patient in the interest of time, but this—

The Court: Don't lead the witness, counsel.

By Mr. O'Donoghue:

Q. What type of settlements have general organizers made where disputes have arisen?

A. Speaking from my own experience, and from what I have observed, most of their work is in two categories, or you might put it that way, settling individual disputes between individuals within the framework of the UA and jurisdictional disputes.

Q. Have they made any decisions with respect to complaints that members might have?

A. That is going on all the time, yes, sir.

Q. Have they ever made any decisions with respect to employment of members that you know of?

[fol. 299] A. I am aware of general organizers manning jobs, yes, sir.

Q. Do you know of any occasion where they ordered local unions to put men to work?

A. Yes, sir.

Q. Have the local unions complied?

A. Yes, sir.

Q. Now on this occasion that you went out to this job site with Mr. Mullally to see Mr. Borden, did Mr. Mullally try to settle that case?

A. Well, I think he was doing pretty much what we were all trying to do, get the man to follow the usual procedure within the local rather than go to outside sources.

Q. What reference did Borden make to filing suit?

A. He said he had turned it all over to the lawyer.

Q. And at that point you left?

A. Yes, sir.

Mr. O'Donoghue: No further questions.

Redirect examination.

By Mr. Klein:

Q. Mr. Galvin, Mr. O'Donoghue has asked you about Section 188, second paragraph, there again the only thing that can be appealed from is suspension or expulsion, isn't it?

[fol. 300] A. I read it.

Q. Well, isn't that correct, is there anything else that can be appealed from?

Mr. O'Donoghue: Would you have the witness read the first sentence slowly.

By Mr. Klein:

Q. Read the first sentence there, Mr. Galvin.

A. (reading) "Appeals may also be taken from any decisions or orders of suspension or expulsion made by the general president or his representatives or any organizer to the general executive board within 60 days and the decision of such board shall be final and shall be communicated to the interested parties by the general secretary-treasurer to whom, and to the general president, such decision of the general executive board shall be rendered."

Q. So under this provision, unless he had been expelled or suspended, you don't have any appellate procedure to go through, do you?

A. May I check and read over the first paragraph, please?

Q. Yes.

Mr. Wells: Judge, may I suggest, this is all a matter for argument at some other time. The constitution is in evidence, it either says it or it doesn't, and arguing with the witness about it, I object to further interrogation of the [fol. 301] witness about what the constitution provides, it speaks for itself.

The Court: I sustain the objection.

Q. Let me ask you one other question, Mr. Galvin. Now in your outline a moment ago, in your appellate procedure, you stated that ultimately you reached the president, is that correct, of the United Association?

A. The ultimate authority is the convention of all the members of the United Association.

Q. That is correct, I am sorry. But the last resort prior to waiting five years is the president?

A. I think it is the general executive board and I don't think I was clear; I think I have been straightened out on

that, if you will recall my answer, I wasn't sure whether it was the general executive board or general president.

Q. Oh, I see. All right. Now, Mr. O'Donoghue asked you some questions about the United Association with regard to whether or not they had anything to do with your negotiation of contract and that sort of thing; they have, under this section 30 here that you have discussed, the United Association has quite a bit of authority over the local union, don't they?

A. Yes, sir.

Q. And when the general organizers tell the local union [fol. 302] to do something, they pretty well do it, don't they?

A. Assuming you are speaking of a violation of the constitution.

Q. Well, that is what I am speaking of?

A. Certainly it is.

Q. If a general organizer learns that some member has been discriminated against, and advises the union to quit discriminating against them, they will do it, under penalty of being expelled from the United Association, isn't that correct?

A. That is implied and I think he might tell them, yes.

Q. All right, and isn't it a fact, Mr. Galvin, that the United Association is nothing more than all of the locals throughout the country?

A. I would go further than that, I would say it is all of the members.

Q. All right. So the United Association isn't something that is just sitting up here suspended in midair, it is made up of all the local unions, isn't it?

A. All of the local unions and all of the members, yes, sir.

Mr. Klein: That is all we have, Your Honor.

Mr. Wells: That is all, thank you.

[fol. 303] The Court: Call your next witness.

Mr. Smith: I would like to call as the next witness Mr. Herman Borden.

HERMAN BORDEN, after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Smith:

Q. Please state your name and address?
A. Herman Borden, El Paso, Texas.
Q. Mr. Borden, are you any relationship to the plaintiff in this case, Mr. H. N. Borden?
A. He is my father.
Q. Mr. Borden, what is your trade or business?
A. I am a plumber.
Q. Are you a journeyman plumber?
A. I am both, I am a journeyman and also master.
Q. How long have you been a plumber, Mr. Borden?
A. Oh, since about 1935.
Q. Are you a member of any labor union?
A. What do you mean by that, am I a member of any labor unions?
[fol. 304] Q. Are you a member of any labor union?
A. Oh, yes.
Q. Which unions are you a member of?
A. Local 100 and United Association.
Q. Both of the defendants in this case?
A. That is right.
Q. Now have you ever discussed with your father, Mr. H. N. Borden, here his problems concerning his complaint against Local 100?
A. Yes, sir.

Mr. Wells: If the Court please, we are going to object to any father-son discussion.

Mr. Smith: Your Honor, we haven't asked any question as to what they said.

The Court: Well, I will let him make that answer and no further along that line.

Q. Have you discussed this with him on one occasion or two occasions or how many occasions?

A. Oh, several occasions since the suit was started, I will say.

Q. Has his dispute with Local 100 and the International organization affected him in any way?

A. Well, I would say it affected him in quite a few different ways.

Q. Well, how did it affect him?

[fol. 305] A. Well, the first thing, we have always traveled together.

Mr. Wells: Just a moment, I object to any testimony along this line until a predicate is first laid as to what opportunity this man had to observe a particular state of facts and what also he may have had to observe any changed state of facts.

The Court: Sustain it.

Q. Mr. Borden, how long has it been since you have lived with your father?

A. You mean in the house with my father, or what?

Q. Yes.

A. Oh, I haven't lived in the house with my father in 15 years, I would say.

Q. How long has it been since you have lived in the same town with him?

A. Oh, about six weeks.

Q. And where was that you were living at that time?

A. Corsicana, Texas.

Q. And how long did you live in Corsicana, Texas, at that time, Mr. Borden?

A. Oh, this last time we both lived there off and on for two years.

Q. All right. Did you live in the same town with him any time prior to that?

[fol. 306] A. Yes, sir.

Q. During the last five years?

A. Yes, sir.

Q. Or six years—where was that?

A. Well, when he left Dallas I was in business in Shreveport, Louisiana, and he came there and we lived in the same town for approximately, oh, I would say from the time he arrived there until '58.

Q. When did he arrive there?

A. Oh, he came over there sometime around '54, I think, somewhere along there.

Q. All right, now when was the time before this that the two of you lived in the same town?

A. Well, let's put it this way, we have never been over two months apart in the last 20 years.

Q. Living in the same town?

A. Working together, yes, sir, since I learned the trade.

Q. All right, have you worked on any jobs with Mr. Borden since 1953?

A. Well, let's put it this way, he worked for me about two years in Shreveport, off and on, when he was able.

Q. When was that?

A. Oh, in '54 and in '55.

Q. And did you have occasion to work with him at any time after that?

[fol. 307] A. Well, yes, sir, I will put it this way, he couldn't go to work any place else, so when he came back to Corsicana, he started in the repair business and I went there and went back into business and we worked pretty close together, yes, sir.

Q. Now have you had occasion to observe your father over many contacts together during the past six years?

A. Well, I have been around him, we will say, day in and day out, almost for the past six years.

Q. All right, did you live in the same town with your father any time immediately prior to September of 1953?

A. Prior to that?

Q. Yes.

A. Yes, sir, I worked with him in Galveston, while he was there, we both worked on the same job.

Q. You both worked on the same job down in Galveston, Texas, is that the one that he testified about here earlier?

A. That is correct, the hospital.

Q. How long did you work with him on that job?

A. Oh, about that time, I would say, five or six months on that job. I was on and off of it, like everybody else.

Q. All right, Mr. Borden, have you had the occasion to observe any differences in your father between the time

you worked with him on the Galveston job and that time [fol. 308] prior to September of 1953 and since that time?

A. Well, I don't quite follow your question there exactly, but I think—

Q. Have you noticed any change in Mr. Borden between the time he was working down there in Galveston and between the time after he has had this dispute in the union?

A. Well, I will put it this way, when he was working in Galveston, it is like it has been for 20 years, we make one job, and we make the other, everything was lovely, and since this started, everywhere he goes, or could go, it always hit him in the face, and something would happen he couldn't go to work and hell, he is nervous and upset and everything else all the time and he is always questioning me about where I am going and what I am doing, knowing if he does go, he just doesn't seem to have a chance to go to work, so he just don't go. I will put it that way.

Q. Well, now, does this—

A. It would upset anybody being away from their friends and their work, wouldn't it?

Q. Just exactly tell the jury how this has affected Mr. Borden?

A. Well, for instance, I leave here today and go some place and go to work, as I say, we would always work together, and he would say, "What job are you on, what are you doing", and so forth, and I would tell him, well, maybe [fol. 309] he would want to go to work, knowing he couldn't and it would just make him nervous, he is upset and he can't work, and that is about it.

Q. Well, what do you mean by nervous and upset?

A. Well, just a change that I can see, I mean, just when a man gets sick about half the time or is upset and he can't work, and he worries all the doggone time and can't sleep.

Q. He worries all the time, what does he worry about?

A. Well, about not being able to get on the job and get no job and go to work, and no money, I will put it that way, if you got no money coming in, well, something is wrong.

Q. And this has been since 1953?

A. Well, it was in 1953 when this started and everywhere he goes, like I say, it is thrown in his face to him, he is

brushed off, I will put it that way, he can't go to work, and so I guess that is what you would call it, that would make anybody worry, I think.

Mr. Smith: No further questions,—oh, one other question.

Q. Mr. Borden, in this close association with your father, have you known him to take a drink of any alcoholic beverages or have you seen him take a drink of alcoholic beverages at any time during the past 10 years?

[fol. 310] A. I haven't seen him take a drink since I would say the last 18 or 19 years of nothing.

Mr. Smith: No further questions.

Cross examination.

By Mr. Wells:

Q. Were you aware that your father gave a deposition in this case?

A. I certainly am.

Q. Mr. Borden, do you recall where you were working in 1954?

A. Yes, I recall where I was working in 1954.

Q. Where?

A. Shreveport, Louisiana, part of the time.

Q. Where else, sir?

A. Well, let's say Shreveport, Louisiana, 1954.

Q. I believe the record shows your father was in Dallas all during the year 1954, so I take it there was at least one year there where you were apart from him so far as work was concerned for more than two months?

A. No, sir, I wouldn't say so.

Q. Did you come over to Dallas?

A. I certainly did.

Q. What work did you do in Dallas?

A. I didn't do any.

[fol. 311] Q. Oh, you are saying you came to visit him?

A. That is right.

Q. Now was he nervous and upset in 1954?

A. He certainly was.

Q. Was he so nervous and upset he couldn't work on the Spencer Plumbing Company job?

A. Well, I will put it this way, he was nervous and upset and he was working and he was worried all the time, let's put it that way.

Q. Was he so nervous and upset he couldn't work for Keiffer Plumbing Company?

A. I don't know about that.

Q. Was he so nervous and upset he couldn't work for Rose Plumbing Company?

A. Anybody can work when they have to, where they have to.

Q. Was he so nervous and upset he couldn't work on the Texas Housing job out here?

A. I said anybody can work when they have to, where they have to.

Q. Was he nervous—

A. Yes, sir, he was nervous.

Q. Now was he so nervous and upset he couldn't work for the Dallas Independent School Board?

A. I don't know whether he was so nervous and upset [fol. 312] he couldn't work or not, but he worked.

Q. As a matter of fact, he worked and he quit that job at the Housing Project to go to work for the school board, didn't he?

A. Yes, I don't blame him a bit in the world.

Q. It was a better job with the school board?

A. Certainly, it was steady, something he could depend on, he couldn't depend on anything else.

Q. Something he could have stayed on as long as he wanted to, couldn't he?

A. I wouldn't say that, no, people get run off every day for different reasons.

Q. Did he get run off from the school board?

A. I don't know, I wasn't here.

Q. Well, now you have been real close to your father, tell this jury why it was he left the school board?

A. I don't know why he left the school board.

Q. You don't have any idea about that?

A. No, that was his idea, that wasn't mine.

Q. It was his idea to quit that job?

A. Is it a man's privilege to quit when he wants to?

Q. Now why are you hesitant about admitting to this jury—

A. I am not trying—I will admit to the jury, but I think the jury will agree with me that it's a man's privilege to [fol. 313] quit, that is why we are all here.

Q. All right, now those were two jobs then that he had and he quit, the housing job down here and the school board job; now did he have some jobs after that?

A. Yes, he came back to Shreveport and worked with me when he could.

Q. Do you recall why it was he came back to Shreveport?

A. Yes, sir, because he went down to Monroe, Louisiana, some place, and bought—he had a home there and was supposed to have gone down there and gone to work, and when he got down there, he ran into the same thing he ran into here, and he couldn't work, so he had to do something, and so he came over and went to work for me when he could.

Q. Well, now, did he have his—would you call it mental anguish, is that what you have in mind?

A. I don't know whether you call it that or not.

Q. Well, there is a claim here in this suit whereby Mr. Borden is asking for $5000 as damages for mental anguish and suffering. Now, were you familiar with the fact that your father filed a lawsuit down in Louisiana also?

A. Yes, sir, I was.

Q. Now were you familiar with the fact that in aggregating a claim of $30,920.00 there he was asking for $5000.00 [fol. 314] mental anguish and humiliation?

A. Yes, sir.

Q. Do you know on what basis he divides up the amount of mental anguish and humiliation between the Dallas Local and the Monroe Local?

A. I suppose he got tired of being run off everywhere he went. It was just running him nuts or something like that, I would put it. You would be the same way, I imagine, if you got kicked around everywhere you went.

Q. How long did you continue to work in Shreveport?

A. I was there until 1958.

Q. Did you leave there voluntarily?

A. Well, I would say that in a way.

Q. Did you give employment to your father when he wanted employment?

A. Oh, when I could yes, the jobs that I had that he could get on, that he was able to do.

Q. And were there a substantial number of such jobs?

A. Well, there is not too many of those kind that he could do, I had about 20 to 30 plumbers working at various times and I picked the easy ones that he was able to do and I would let him do them, yes.

Q. Now I believe you say you worked down in Galveston, how did you happen to leave the Galveston job?

A. The same reason I have left lots of other places, I [fol. 315] just decided I wanted to leave Galveston and I left Galveston.

Q. Was there any question about your drinking down on that job in Galveston?

A. Quite a bit.

Q. Did that have something to do with your being fired off of that job down there?

A. I was not fired off of that job in Galveston.

Mr. Wells: That is all, no further questions,—oh, wait, I have a question here, I am sorry.

By Mr. Wells:

Q. Are you going to be here through this trial, I think we can save the jury's time, if you will just be available, sir?

A. I will be available from now on.

Mr. Wells: I have a question to ask but I will excuse you at this time.

The Court: Stand aside, sir.

Mr. Smith: Plaintiff rests, Your Honor.

The Court: What say the defendants?

Mr. Wells: Your Honor, please,—

The Court: Plaintiff rests, he said.

Mr. Wells: We will have some motions for Your Honor and then we will be ready to go.

The Court: Members of the jury, bear in mind the instructions heretofore given you and be back at 1:45.

[fol. 316] (Reporter's Note: Court reconvened at 2:08 p.m., at which time the following proceedings were had outside the hearing of the jury:)

Mr. Smith: At this time I would like to reopen for the purpose of introducing all of Plaintiff's exhibits which have not heretofore been introduced, I think they all have. We have the union constitutions and the contracts which have been discussed, and I am not sure that they have been introduced into evidence.

The Court: Well, I will let you reopen to offer your exhibits, what are they?

Mr. Smith: They are Plaintiff's Exhibits 6, 7 and 8.

The Court: They have been offered; anyway, you offer them again?

Mr. Smith: I just want to offer them into evidence at this time.

The Court: Haven't they been offered once before?

Mr. Smith: I think so, Your Honor, but I checked with the reporter and she said she is not sure, and in order to preserve the record, I would like the record to reflect we have offered them.

The Court: What are 6, 7 and 8?

Mr. Smith: They are the union constitutions and the contract between the local union and the Association— [fol. 317] contractors here in Dallas.

Mr. Wells: We have no objection, Judge, I think they are already in.

The Court: All right. Plaintiff's Exhibits 6, 7 and 8 are admitted.

Mr. Smith: All right, at this time also we would like to enter into the stipulation Mr. Wells and he has prepared it and would like to read it into the record.

Mr. Wells: It is hereby stipulated and agreed that in the performance of the mechanical contract (installation of plumbing, heating and air conditioning) at the Republic National Bank, Farwell Company, Inc., installed machinery and equipment having a cost price of over one-half million dollars, which was manufactured in states of the United States other than Texas and transported in interstate commerce to the job site at Dallas, Texas.

The Court: You are agreeing that is part of his testimony or are you offering it?

Mr. Smith: No, I am not offering it, Your Honor.

The Court: Oh, you just are agreeing with him that that is a fact?

Mr. Smith: I am agreeing with him.

The Court: And it is so stipulated, Mr. Smith?

Mr. Smith: Yes.

The Court: Bring in the jury, please.

[fol. 318] (Reporter's Note: The following proceedings were had in the presence and hearing of the jury:)

The Court: All right, proceed.

Mr. Wells: We call Mr. Brady.

The Court: All right, let's have order. Call Mr. Brady.

Mr. Wells: And if Your Honor please, there may be a witness or two in the room who is not a member of Local 100. Do I take it you still have invoked the rule?

Mr. Smith: Yes.

The Court: If there is anybody in the courtroom who is a witness or who is to be a witness and who is not a member of Union Local 100, you must retire outside the courtroom and not listen.

J. P. Brady, after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Wells:

Q. State your name, please, sir?

A. J. P. Brady.

Q. Where do you live, Mr. Brady?

A. Monroe, Louisiana.

[fol. 319] Q. What is your present occupation?

A. I am presently in the utilities construction business.

Q. As an employer?

A. As an employer.

Q. How long have you been in that business?

A. Four months.

Q. What was your previous occupation?

A. Business manager of UA Local 659.

Q. Is that known as the Plumbers Local?

A. That is right, Plumbers and Steam Fitters Local.

Q. And where is Local 659?

A. Monroe, Louisiana.

Q. Now is that the same local union that is a defendant in a lawsuit over in Monroe, filed by Mr. H. N. Borden, as shown by Defendants' Exhibit 2?

A. It is.

Q. How long had you held the position of business manager of that local union?

A. Almost nine years, lacking three months.

Q. Now on any occasion did you ever invite Mr. Borden to move over to Monroe?

A. No.

Q. On any occasion did you ever make any assurance to Mr. Borden with respect to the availability of work in the [fol. 320] Monroe area?

A. I made it a practice not to promise anyone employment.

Q. Did you promise him any?

A. I did not promise him any employment.

Q. Did you have any conversations with Mr. Borden about that time?

A. We talked on several occasions about the employment in that area.

Q. About when, Mr. Brady?

A. I don't remember the exact time, now I don't even recall the year.

Q. Well, he sets out in his lawsuit here some allegations with respect to conversations around 1955 or '56. Without being precise as to the date, did you have some conversations with Mr. Borden around about that time some four or five years ago?

A. I did talk with Mr. Borden on several occasions.

Q. All right. Now the first one that you can recall with respect to employment, will you just tell us what you said and what he said?

A. I told him that the labor market in that area was flush at the time, in other words, that there were plenty of people available, that due to that situation or condition prevailing, no one could promise anyone a job.

[fol. 321] Q. Thereafter did you have other conversations with him?

A. I did, and it went along the same line.

Q. Did there come any time when you had a controversy with him about the matter?

A. Will you explain what you mean now by that?

Q. Well, what I wanted is just as short form as you can give the jury as to what happened over there; Mr. Brady, in your own words, with respect to any difference of opinion you and Mr. Borden may have had?

A. As far as I know, there never was a difference of opinion. My story ran true to form, so far as the work situation, due to the influx of labor, or we might say, plumbers, for that area for several years there. The labor market has been crowded for the plumbing trade.

Q. Did he ever complain to you about your not sending him out on work?

A. He complained about not being sent to certain jobs.

Q. And in connection with such complaint, was it ever necessary for you to call the police?

A. He became rowdy and vulgar in the office one day and I asked him to leave and he invited me to put him out and I did have to call the police; however, he was gone when the police got there.

Q. And in connection with it, just tell us in some detail [fol. 322] about that incident, what occurred?

A. Well, as we mentioned, he had been there several times, he seemed to think that he should go to certain jobs regardless of the labor situation or the surplus of labor in that area, and then he thought that I had the prerogative of sending him or leaving him alone, and he was very much displeased with it.

Q. And what did he say about that?

A. Oh, I can't give you exact wordings or phrases that he may have used, but he wanted to leave the impression that the local union was running over him, or that I, myself,

could possibly be running over him, in not being able to put him just where he wanted to go.

Q. And what happened when he said that?

A. He made accusations and such and in those accusations, or terminology, he did use some vulgar words, I asked him to refrain from.

Q. Was there an office girl there at the time?

A. There was.

Q. All right. What did he do when you asked him to refrain from it?

A. He told me if I didn't like what he said I could put him out.

Q. And then what happened?

A. When I got up to put him out, he went out the door, [fol. 323] and as he went out the door, he took his big long knife out and threatened to use it and then I turned to the office and called the police.

Mr. Wells: That is all,—one other thing, if I may, so you can cross examine him.

By Mr. Wells:

Q. At that time did you have any knowledge about this lawsuit?

A. No, I had not become familiar with it.

Q. When did you become familiar with this lawsuit?

A. Last fall I was called to Shreveport by the local there, at that time there were rumors he was going to sue the local in Shreveport and they wanted to know the particulars of what he did to us and at that time they told me he had sued the local here in Dallas.

Mr. Wells: That is all. Thank you.

Cross examination.

By Mr. Smith:

Q. Mr. Brady, what did you say your position was with the Shreveport local?

A. I was never connected with the Shreveport local.

Q. With the Monroe Local?

A. I was business manager or business agent.

Q. Business manager, or business agent, when did you hold that position?

[fol. 324] A. From June of 1951 to the first of March, 1960.

Q. Did you ever have occasion to refer Mr. Borden out to a job?

A. I did refer Mr. Borden out.

Q. When was that?

A. I don't remember the exact date.

Q. What year was it?

A. I don't remember the year.

Q. Before this lawsuit that he filed in Louisiana?

A. Yes.

Q. How long before?

A. I couldn't tell you in time.

Q. A year or two years or three years?

A. No, it wasn't three years from the time he first came there until he sued me, I would say some six or eight months, if I remember correctly, it was in September, approximately, it was in the fall of one year and he sued me the next spring.

Q. At the time didn't you have some conversation with Mr. Borden and didn't you tell him as a fact that he should come down to Shreveport and work and didn't he come back to Dallas and get his family and bring them down there to Shreveport?

A. I have no knowledge of any of his extracurricular activities.

[fol. 325] Q. You didn't hear that?

A. No.

Q. He didn't tell you that?

A. No.

Q. Isn't it a fact, Mr. Brady, that Mr. Borden was referred out, was on a job, and was pulled off the job?

A. It is not a fact.

Q. That is not a fact?

A. No.

Q. You say you never heard of Mr. Borden's lawsuit until this last fall, is that correct?

A. His lawsuit with the Dallas—

Q. The Dallas Local—

A. —people.

Q. —and they never mentioned that to you at any time in any union meetings, is that right?

A. No.

Q. Did you go to any convention of the International organization in 1956?

A. I was at the 1951 and 1956 conventions.

Q. Do you deny that it was brought up at that meeting that Mr. Borden had sued the local union and printed in the union publication of that convention?

A. After his lawsuit with Local 659 I went back to the minutes of that convention and in the agenda for the [fol. 326] convention over in one of the last proposals, there was a proposal for a hearing on Mr. Borden's case.

Q. It was brought up at the convention, wasn't it?

A. I did not stay throughout the convention.

Q. Are you the only person from your local that went down to the convention?

A. There were two of us there.

Q. You didn't read the publication that was put out by the union after that convention?

A. No, sir.

Q. And see in there that they printed about Mr. Borden's lawsuit?

A. No, sir.

Q. Did you know anything about the suit against the International Mr. Borden had brought here in Dallas?

A. I didn't know that he was even suing International.

Q. International never did inform you of that?

A. No.

Q. International didn't inform you of that even after Mr. Borden had filed suit here in Dallas and filed suit down there until this last fall, is that correct?

A. Would you rephrase that, please, I didn't quite understand.

Q. Mr. Borden sued International there and the International here, and you didn't hear about the suit against [fol. 327] the International here in Dallas until just this last fall?

A. I didn't know until today that he had sued International.

Q. Oh, you didn't know that?

A. That is right.

Q. What is your present job with the Shreveport local, Mr. Brady?

A. I am not connected with the Shreveport local in any manner.

Q. What business are you engaged in?

A. I am in the utilities construction business.

Q. Where?

A. Monroe, Louisiana.

Q. Do you work for yourself in that business?

A. I am an employer, it is a corporation.

Q. Do you employ union men on that job?

A. I do.

Q. Do you employ anybody other than union men?

A. Yes, I employ a bookkeeper who does not belong to the union.

Q. Do you employ any worker other than union personnel?

A. No.

Q. You rely on them for all the men you work?

A. I draw from the local union.

Q. You what? What was the answer to that question?

[fol. 328] Mr. Wells: He said, I draw from the local union.

Q. And all the people that you employ on jobs are referred out by the local union of the United Association, are they not?

A. No, because we work different crafts; we don't get them all—unfortunately, I can't get them all through Local 659.

Q. All of your plumbers and all that come within the jurisdiction of United Association are hired through the local of United Association, are they not?

A. The pipe fitters and welders that I have employed have been employed through Local 655.

Mr. Smith: No further questions.

Mr. Wells: That is all. May he be excused? Do you have any objection, Mr. Smith?

Mr. Smith: No, sir.
The Court: Yes, sir.
Mr. Wells: I understand you may be excused.
The Court: Call your next witness.
Mr. Wells: We will call Mr. Northington, please.
Mr. Smith: Would you hold him until the recess?
Mr. Wells: Excuse me, Mr. Brady, Mr. Smith has asked you to stay for a little while until a recess. Do you want him outside?
Mr. Smith: Yes.
[fol. 329] Mr. Wells: You will have to go outside, Mr. Brady.

Marshal D. Northington, after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Wells:

Q. Would you state your name, please, sir?
A. My name is Marshal D. Northington.
Q. What is your business, Mr. Northington?
A. I work for the Farwell Company, Incorporated, Mechanical Contractors.
Q. How long have you worked for that company?
A. Well, this last time, since along about July or August of '46.
Q. And had you worked for them even prior to that?
A. Yes, sir.
Q. Now are you acquainted with the fact that Farwell had the mechanical contract on the Republic National Bank Building?
A. Yes, sir.
Q. What was your function in connection with that contract?
A. I was general superintendent.
[fol. 330] Q. Just for that job at the Republic Bank or did Farwell have other jobs going at that time?

A. No, there were several other jobs in the City of Dallas, too, that I was the same capacity on.

Q. Now do you recall what some of those others were at that time?

A. Well, Gibralter Life Insurance Building, the Baptist Building, the new addition there, it is called the Baptist Building, across there from the First Baptist Church, West Dallas Housing, 1500 units out there.

Q. And you had all of these overlapping with each other at some time or another?

A. Yes, sir.

Q. Now did Farwell also have a veterans hospital job down here south of town?

A. Yes, they did; however, I did not—well, I was on that job for—

Q. Who was superintendent of that job?

A. Mr. Roton was after it got started. Mr. Lee Roton. I was there just maybe a month.

Q. Now directing your attention, after you got off the veterans hospital job, and Mr. Lee Roton became superintendent there, I take it you were superintendent of Farwell's other operations, these operations you have told us about?

A. Everything except the veterans hospital.

[fol. 331] Q. Where was your office?

A. Well, I had an office on all jobs and I also had an office out at our shop.

Q. I see.

A. But I was in the—

Q. Now did you yourself do any calling to the local union asking them to furnish men on the Republic job?

A. Most of that was done by the two superintendents that I had on the job, one was a plumber and the other was a steam fitter.

Q. All right, now who was authorized to call for steam fitters?

A. Grady George.

Q. Who was authorized to call for plumbers?

A. Jack Heath.

Q. Did you authorize anybody other than Jack Heath or Grady George to make requests on behalf of Farwell Company for employees on that job?

A. No, sir.

Q. Specifically, did you ever authorize Mr. A. G. Thurman to call for anybody on that job?

A. I am sure I didn't.

Q. All right, did you ever call for Mr. Borden on that job?

A. I don't—I never heard of Mr. Borden until a few [fol. 332] weeks ago that I remember of.

Mr. Wells: That is all. Thank you.

Cross examination.

By Mr. Smith:

Q. Mr. Northington, you say you were the general supervisor of all of the work for Farwell Construction Company during the year 1953, is that correct?

A. Yes, with the exception of the veterans hospital, that he mentioned.

Q. In other words, you didn't have authority over Lee Roton?

A. No, sir.

Q. But you handled all the other jobs Farwell Construction Company was handling at that time, is that right?

A. In the City of Dallas.

Q. At that time Farwell had more business in the City of Dallas than any other contractor, didn't they?

A. Well, of course, Farwell Company is the only one I knew anything about, but we had an awful lot of work at that time.

Q. Well, I think you told me earlier that Farwell Construction Company had the biggest jobs in town at that time, and that the Republic Bank job and the Baptist Building were tremendous projects, isn't that true?

[fol. 333] A. Well, I don't remember telling you anything like that because, honestly, the Gibralter Building was a lot bigger than the Baptist Building.

Q. And you were going from job to job, weren't you?

A. Yes, sir.

Q. And as a result, you didn't hire the men on the jobs, did you?

A. Not directly, no; what I tried to do, I tried mostly where we had work, and had men from one job, one job needed men, why, then another job was catching up, I tried to transfer those men back and forth or something like that, you know, as long as it was suitable with the respective supinterindents on the job.

Q. Didn't you know, Mr. Northington, that the foremen on the plumbing work on the Republic National Bank Building job were hiring their own men and their own crews?

A. Well, no, I would say that would all come through Mr. Heath.

Q. Do you know?

A. Well, of course, Mr. Heath, if he gave somebody authority to, I don't know it, personally, I did not.

Q. Mr. Heath had the authority to delegate his authority for hiring to his foremen, didn't he?

A. Well, I don't—the main one I looked to was Mr. Heath and Mr. George.

[fol. 334] Q. And however they ran the job, as long as the work was satisfactory to you, was all right?

A. That is right.

Q. And you relied on them, didn't you?

A. That is right.

Q. And if they delegated their duties to others to help them run that job, and to hire the men, that was all right, too, wasn't it?

A. Well, I don't know just how far that that was gone, I sure don't, that is what I—

Q. Well, he could have delegated the duty down to his foreman, couldn't he?

A. Chances are, there are some chances that he could.

Q. You didn't tell him not to, did you?

A. Well, it is—it has always been my practice that the foreman, or superintendent on a job more or less working with me does the hiring, we always go over the thing before a—if you need a bunch of men, need one man or three men.

any superintendent I have got I think will tell you that they have always talked to me first to see if I had some men somewhere else that I could move over there; if I didn't why then, they—them or me one would get them some more.

Q. It was up to them to get their own men if you couldn't transfer men over to them, is that right?

A. As a usual thing. This is the way that I—the foreman [fol. 335] or the superintendent on the job is the one who is going to have to work with whatever men is hired more than I am and I never have tried to force or forced any man that some foreman or superintendent didn't want.

Q. All right then, the men that they could get along with best and get the job done,—

A. That is what I was interested in.

Q. —was what you wanted them to have, right? You left it up to them to run their own jobs so long as they ran them right, isn't that correct?

A. As long as they done it to suit me, yes.

Q. As long as they did the work to suit you?

A. Yes.

Q. And if Mr. Heath had told Mr. Thurman that if you have got a man short or two men short, you can go down and hire them, because we don't have anybody we can transfer over, that would have been all right, wouldn't it?

A. Well, I don't know exactly what you are getting at but I—

Q. I am just asking you if that would have been all right?

A. But Jack, anybody—if there was anybody hired. I looked for one thing, that it was either Mr. Heath or Mr. George on that particular job hired them.

Q. Well, now, you said as long as they ran the job, it [fol. 336] was all right with you?

A. That is right. But if they hired a man, that was fine.

Q. All right. And they could have let somebody else in the organization hire them for them, couldn't they?

A. They might have, but I don't know, I don't know about it.

Q. Well, could they do that?

A. I guess they could, sure.

Q. Did you check up to make sure they didn't do that?

A. No, I didn't.

Q. Did you care whether they did or not?

A. So long as the man suited them, I was looking to the two men, they had several foremen under them, both of them did, and I was only looking to the two men, I wasn't looking to the ones below them, I was looking to the two men.

Q. All right, you were looking to those two men on the job and they were running that job, they had the authority to run that job, is that right?

A. That is right.

Q. Mr. Northington, did Farwell Construction Company ever have any difficulty with Local Union 100 in referring men out to the job?

A. Well, there has been several strikes.

Q. When Jack Heath first went on the job, was there [fol. 337] any difficulty?

Mr. Wells: We object to this as immaterial, Judge. This is a matter we went into yesterday and I understood the Court ruled with us.

Mr. Klein: Your Honor, the Court ruled that the objection was good because we were unable to definitely determine the date that Mr. Heath went on the job.

The Court: What question are you asking him?

Mr. Smith: I asked him if there was any trouble at the time Mr. Heath went on the job.

The Court: With what?

Mr. Smith: With the Local Union 100 in referring men to the job.

The Court: I overrule it.

By Mr. Smith:

Q. Would you answer the question, Mr. Northington?

A. Of course, when he came on the job, there was, I understand that there was quite a few men who didn't want to work with him.

Q. Well, that was Local 100 that didn't want to work with him?

A. Well, that's—yeah, well, the men itself, I don't—

Mr. Wells: May we—pardon me, let's set the predicate first.

[fol. 338] Mr. Smith: I will do that in my next question.
Mr. Wells: Well, let's set the predicate first.

By Mr. Smith:

Q. Now when was it that Mr. Heath went on that job?
A. I don't remember.
Q. Give us the approximate time?
A. I can't tell you the approximate time.
Q. Can't you tell us the year?
A. I would have to look it up.
Q. Can't you tell the year?
A. Honestly, I am afraid to tell you the year, but it is—I think everybody knows about the time the job started, but just exactly the year, I couldn't tell you.
Q. Well, was he on there at the time the job started?
A. He—I think he came just about the time that the—I think, if I am not mistaken, all of the basement floors had been poured.
Q. You can't establish—
A. We were still working in the underground work down in the basement floors.
Q. You can't establish any time on that then?
A. I can by looking back at my time records, but I wouldn't—
Q. Mr. Northington, are you a member of any labor union?
[fol. 339] A. Am I?
Q. Yes.
A. Yes.
Q. What union are you a member of?
A. I am a member of Local 100 here in Dallas.
Q. Have you had occasion to discuss this case with them at any time?
A. With Local 100?
Q. Yes, sir.
A. Well, what do you mean, on this particular case here?
Q. Yes, sir.
A. Well, I have talked with their attorney but as far as knowing anything particular about the case, I don't know it, I do know it has come up on the hall floor several times.

which I haven't had—that is, so I have heard, but I haven't attended the meetings, any meetings that it was brought up.

Mr. Smith: No further questions.

Mr. Wells: That is all, thank you—I am sorry, Mr. Northington, just a couple here.

Redirect examination.

Q. Two or three times in response to Mr. Smith's ques-
[fol. 340] tions you said you left it to them, this matter of hiring, now, did you mean you left it to Mr. Thurman who was a foreman over ten men or you left it to Mr. Heath, who was the foreman on the job?

A. Either to Mr. Heath or to Mr. George, referring to that particular job.

Q. But not to Mr. Thurman?

A. No, sir.

Mr. Wells: That is all, thank you.

We call next Mr. Walter Thurman.

Walter Thurman, after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Wells:

Q. State your name to the jury, please, sir?

A. Walter Thurman.

Q. What is your business, Mr. Thurman?

A. I am a plumber.

Q. What is your present employment?

A. With Brown-Olds Mechanical Contractors in Galveston.

Q. Was there a time when you were employed by the Farwell Company in Galveston?

[fol. 341] A. Yes, sir.

Q. Directing your attention to the years 1952 and 1953, were you so employed in Galveston, Texas?

A. Yes, sir.
Q. In what capacity?
A. As a plumbing foreman.
Q. Now do you know Mr. A. G. Thurman?
A. Yes, sir.
Q. Were you here in the courtroom yesterday when he testified?
A. No, sir.
Q. Is he kin to you?
A. My brother.
Q. Did he also work on that job?
A. Yes, sir.
Q. Was he a supervisor on that job?
A. No, sir.
Q. You were a supervisor on that job?
A. Yes, sir.
Q. Do you know the plaintiff, Mr. H. N. Borden, sitting here?
A. Yes, sir.
Q. Did he work on that job?
A. Yes, sir.
Q. Do you know his son, the man holding up his hand [fol. 342] right there on the front row?
A. Yes, sir.
Q. Did he likewise work on that job?
A. Yes, sir.
Q. Do you recall the circumstances of his son's employment there?
A. Not exactly, no, sir.
Q. Well, do you recall an occasion when he was,—the question of the termination of his employment came up?
A. Yes, sir, partly.
Q. Would you tell the jury about that, please, sir, as best you recollect it?
A. Well, the best that I recall, I really don't remember if he quit or was let out at the time, there were so many men on that job, that were changing all the time, being laid off, I really don't remember if he was or not.
Q. Do you recall having a conversation with Mr. Lee Roton about that matter?
A. Yes, sir.

Q. What capacity was Mr. Lee Roton on down at that job in Galveston?

A. He was superintendent over me.

Q. And do you recall that Mr. Borden, Sr.,—

Mr. Smith: We object, Your Honor. The purpose of this line of question to elicit any testimony as to what Mr. [fol. 343] Roton told Mr. Thurman.

The Court: Well, I don't think—he just said a conversation, the next question, do you recall something about Mr. Borden, Sr., and I will let him finish it.

Q. Now did Mr. Borden, Sr., come to you or Mr. Roton with respect to reemployment of his son?

A. I believe it was to Mr. Roton.

Q. Your recollection is he came to him?

A. I think so, yes.

Mr. Wells: All right, we will get that from him.

By Mr. Wells:

Q. Now do you recall the circumstances when Mr. Borden now I am talking about the father, the plaintiff in this case, do you recall the circumstances under which he left in Galveston?

A. Yes, sir.

Q. Would you tell that to the jury, please?

A. Mr. Borden quit down there.

Q. How did that happen?

A. He—well, we had finished our part of the work and there was to be a layoff, Mr. Borden asked me if he was to be laid off with them, and I said, "Yes", and he said, well, he thought he would just quit.

Q. All right, now what policy and process do you follow in determining which men will be laid off, do you do that on a seniority basis, or the basis of keeping the best men [fol. 344] and laying off the men who are not so good?

A. Well, we usually try to keep the best men, of course.

Q. And is that the policy you followed in determining to lay off Mr. Borden?

A. Yes, sir.

Q. And when you communicated that fact to him he said he wouldn't wait for the layoff, he would just quit?

A. Yes, sir.

Q. Did you promise him a job up here in Dallas?

A. No, sir.

Q. Now your brother was down there on the job in Galveston at that time, but was not a supervisor, is that correct?

A. That is right.

Q. Had you, or to your knowledge, anyone else, authorized your brother to promise Mr. Borden a job up here in Dallas?

A. No, sir, not that I know of.

Mr. Wells: You may cross examine.

Cross examination.

By Mr. Smith:

Q. Mr. Thurman, how many men did you have working on that job down there in Galveston?

[fol. 345] A. All together?

Q. Yes, sir, at one time?

A. At one time, that would be a guess, I would say 60.

Q. All right, how many were there on the job after Mr. Borden quit and after there was a layoff?

A. Well, that would also be a guess, but I would say at that time, 25 to 30.

Q. Now being a supervisor, you had occasion to observe Mr. Borden's work, did you not?

A. Yes, sir.

Q. What is your opinion of Mr. Borden as a plumber in his work?

A. Well, I would say about medium.

Q. Was it satisfactory?

A. Yes.

Q. Now, Mr. Thurman, when Mr. Borden left the employment on that particular job, is it your testimony that you absolutely had no conversation with Mr. Borden concerning coming to Dallas and working for the Farwell Construction Company?

A. I wouldn't say that I had no conversation, I don't actually remember if I did or not, but I certainly didn't—

Q. Do you deny that you told Mr. Borden that he could probably get on with Farwell Construction Company if he—

[fol. 346] came up here to Dallas?

A. I don't deny that I said that, but with the understanding that I had nothing to do with any other job than the one I was on.

Q. Do you deny telling him that they needed men up on those jobs in Dallas and he could probably get on the job, to go up there and report in on the Republic Bank job?

A. Yes, sir, that is right, because I had no idea whether they needed men or not.

Q. But you don't know whether you told him to come to Dallas and check in with Farwell Company or not?

A. Well, I didn't tell him to come here to check in with him, no, sir.

Q. Are you absolutely positive of that?

A. Yes, sir.

Q. Are you absolutely positive you didn't suggest to him that he should come to Dallas?

A. Yes, sir.

Q. Are you changing your testimony from earlier, or is this what you meant earlier?

A. Well, I don't know, I would have to get something clear here, you mean that I told him—did I tell him to come up here to go to work?

Q. I am saying, now, let me phrase it again, maybe you are confused, or maybe I am, and I want to make sure [fol. 347] that you understand my question. Do you absolutely deny here in court today before this jury that you told Mr. Borden that he should come to Dallas and check into Farwell Company and see if they could use any men on their jobs here?

A. Yes, sir, that is right.

Q. Mr. Thurman, are you a member of any labor union?

A. Yes, sir.

Q. What unions are you a member of?

A. I am a member of Local 58 in Colorado Springs.

Q. Is that a member of United Association?

A. Yes, sir.
Q. Where is Colorado Springs?
A. In Colorado.
Q. In Colorado?
A. Yes, sir.

Mr. Smith: No further questions.

Mr. Wells: That is all. Thank you. We will call Mr. Criss, please. May Mr. Thurman be excused?

JOHN. M. CRISS, JR., after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

[fol. 348] By Mr. Wells:

Q. Would you state your name, please, sir?
A. John M. Criss, Jr.
Q. How do you spell that, Mr. Criss?
A. (spelling) C-r-i-s-s.
Q. Where do you live, Mr. Criss?
A. In Galveston, Texas.
Q. How long have you lived there?
A. For the past 45 years.
Q. I gather you are about 45 years old?
A. That is right.
Q. Are you a member of the United Association?
A. Yes, sir.
Q. What local?
A. Local 200 in Galveston.
Q. And how long have you been a member of that organization?
A. Since about 1939.
Q. Do you hold an office in that local 200 in Galveston?
A. Yes, sir.
Q. What office do you hold?
A. Business manager.
Q. And how long have you held that office?
A. Since January or February of 1946.

[fol. 349] Q. A little over 14 years then?

A. Yes, sir.

Q. Mr. Criss, did you respond to my telephonic request to bring the original records showing when Mr. Borden cleared into your local and when he cleared out?

A. Yes, sir.

Mr. Wells: Would you mark this for identification, please, ma'am?

(Reporter marked an instrument as Defendants' Exhibit 4 for identification.)

Q. Mr. Criss, I hand you what has been marked for identification, Defendant's Exhibit 4, will you tell the jury what that is, please, sir?

A. This is a sheet showing Mr. N. Borden's record as being in Local Union 200, dues paid and billings, trade card, and so forth.

Q. Is that the original ledger sheet, part of the records of your local union?

A. Yes, sir.

Q. All right, sir, now referring to it, would you indicate what date that shows that he cleared into Local 200?

A. It shows here he cleared into Local 200 on April 1, 1952.

Mr. Klein: April what?

[fol. 350] Mr. Wells: First, 1952.

Q. Does it thereafter show the various dues payments he made and the various dates on which he made them?

A. It does.

Q. Were such payments made sporadically but continuously up until April, 1943—'53; '53, I mean.

A. Until 1953, that is right.

Q. And when did he clear out of the Galveston Local 200 according to that record?

A. It appears he cleared out on April 24th.

Q. April 24th of what year?

A. 1953.

Q. And do you have any record of his paying any dues, having any contact with the local or any employment in Galveston after April 24, 1953?

A. No, sir.

Mr. Wells: We offer the record in evidence and ask leave to withdraw it, if Your Honor, please, and substitute a photocopy, it is an original record.

Mr. Klein: We have no objection.

The Court: All right, you may proceed accordingly.

Q. Now, Mr. Criss, do you know Mr. Borden sitting here at the counsel table?

A. Yes, I do.

Q. Were you in a position to observe in 1952 and '53 [fol. 351] his demeanor and conduct at any union meetings?

A. Yes.

Q. Will you just tell the jury what you observed about him at that time?

A. Well, Mr. Borden attended the meetings, those he did attend, on a number of occasions, he seemed to be loud and boisterous and he was called down to get him in order by the chairman, and at one time he had a little, I would say, discussion with the secretary, well, we had to—the president had to call him down.

Q. Will you state what the facts are with respect to whether or not he appeared to have been drinking on any of those occasions?

A. Yes, in my opinion he appeared to be drinking, yes.

Mr. Wells: That is all. Thank you.

Cross examination.

By Mr. Klein:

Q. Mr. Criss, was Mr. Borden ever assessed any fine or assessment for being loud and boisterous at the meetings?

A. No, sir.

Q. That happens pretty frequently, doesn't it, in union meetings?

A. Yes, sir.

Q. So his conduct wasn't anything exceptional, in fact, [fol. 352] it wasn't even exceptional as most of the people that attend those meetings, was it?

A. Would you state that again?

Q. I say his conduct in being loud and boisterous, as you described it, was not exceptional, was it?

A. Well, in defense of my local union, we have a very good local union and I would say it happens maybe once in three or four months but it don't happen, normally, we have a very quiet meeting.

Q. But every once in three or four months somebody gets assessed for getting too boisterous, don't they?

A. It has happened, I wouldn't know how many times.

Q. I am not sure I understood on this card, Mr. Criss, when did you say that your record reflected that Mr. Borden cleared out?

A. On April 24, 1953. The reason I say that, that is the date of the last dues payment, the clearance card is marked, it shows here, clearance card was issued on the 4th and 30th, and the reason for that is, in those days, we always marked the clearance card as of the last day of the month or somewhere close to the last day of the month, but it appears to me that he evidently cleared out, paid his last payment on this date, that is the way our records—

Q. But he could have cleared out as late as April 30, 1953?

[fol. 353] A. Could have, yes.

Q. Would it have been possible for him to have cleared out after April 30th, 1953?

A. How is that, now?

Q. Would it have been possible for him to have cleared later than April 30th, 1953?

A. No, no, a clearance card is just a card that when you pay that last payment there, if it happened to be on the second day of the month, the dues are due and payable the first day of the month, so you could take a clearance card and you could stay in Galveston or you could travel somewhere else, but you could put that card in within 30 days after it is given to you.

Q. But the clearance card was dated April 30th, he could have stayed in Galveston until May 30th, or the 29th, and then take this card on over and place it in another union?

A. Yes, but without getting any work or having any connection with our union.

Q. Right. Mr. Criss, you stated—approximately how many meetings do you remember Mr. Borden attending in Galveston?

A. I think it is probably on that sheet there, I would say maybe four or five in a period of 12 months he was in there.

[fol. 354] Q. What period was he in there from, I have forgotten now, when he—from April '52—

A. From April 1st was when he first was charged dues until April 24, 1953, '52 to '53.

Q. All right, now, approximately what was the membership of your local during that period?

A. That is a hard question there.

Q. I mean just an average.

A. Probably 250 at that time.

Q. And you say Mr. Borden attended approximately four meetings?

A. That is just a guess, yes.

Q. Now what are you basing your statement on, that Mr. Borden was intoxicated when you saw him?

A. I didn't say Mr. Borden was intoxicated.

Q. I understood you to say a moment ago that in your opinion he appeared to have been drinking?

A. He appeared to have been drinking.

Q. Now what are you basing that statement on?

A. From the recollection that the president had to call him to order two or three times and I can recall that he had a discussion with our secretary-treasurer, who is Mr. I. L. Hanson over there.

Q. I am just asking now for your own personal—the things you know of your own personal knowledge that [fol. 355] caused you to think he was intoxicated, for instance, did you ever smell anything on his breath?

A. No, I don't smell their breaths.

Q. Did you ever see him take a drink?

A. I couldn't say that I did.

Q. So the only reason you say you thought he was intoxicated was that he was rather boisterous at the meeting?

A. That is right, and from my recollection, that is about it.

Mr. Klein: That is all, Your Honor.

Mr. Wells: That is all, Mr. Criss, thank you. We will call Mr. Lee Roton, please, May Mr. Criss be excused?

Mr. Klein: Yes.

LEE ROTON, after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Wells:

Q. Would you state your name, please, sir?

A. My name is Lee Roton.

Q. And what is your occupation, Mr. Roton?

[fol. 356] A. I am retired.

Q. When did you retire?

A. Two years ago.

Q. What was your occupation prior to your retirement?

A. I was a plumber.

Q. Are you the Lee Roton about whom there has been some testimony here?

A. Yes, sir, I am the man.

Q. Were you working for Farwell down in Galveston on the hospital down there?

A. Yes, sir.

Q. And were you later working for Farwell in charge of the Veterans Hospital in Dallas County, here?

A. Yes, sir.

Q. All right, sir, what capacity were you in on the job down in Galveston?

A. Superintendent.

Q. Now, Mr. Walter Thurman has testified that he was foreman on that job?

A. He was.

Q. Did he work under you there?

A. Yes, sir.

Q. Do you know Mr. H. N. Borden, the plaintiff in this case?

A. Yes, sir, I know him.

[fol. 357] Q. You also know his son?

A. Yes, sir.

Q. Sitting back in the courtroom here?

A. Yes, sir.

Q. Do you recall that his son worked down there in Galveston, Texas, on that job?

A. Yes, sir.

Q. Would you just tell the jury what you recall about the son's employment down there?

A. Well, the son was very unreliable, that is about the main thing I could say, because he would show up maybe one day and then wouldn't show up for several days, and then he was drinking quite a bit in those days.

Q. Was he discharged at one time for drinking?

A. Well, I think I told Mr. Thurman not to hire him back.

Q. Then did his father intercede in his behalf?

A. Yes, his father told me that he thought I was doing the boy wrong, that I should give him another chance, and I said, well, I would see about it, and so I talked to Mr. Thurman, and I told him that if the boy come back, to let him go on back to work, and that is what he did, so I don't think the boy ever knew anything about our conversation.

Q. All right, now, on the Veterans Hospital job up here in Dallas, did you ever have any conversation with Mr. [fol. 358] H. N. Borden, that is the father, the plaintiff in this case?

A. Yes, sir.

Q. Did you ever have any conversation with him out at that job?

A. Yes, sir.

Q. Did you at any time request him to come to work on that job?

A. No, sir, never.

Q. Well, specifically, did you ever ask him to come to work and did he reply that he didn't like that duriron work?

A. I never asked Mr. Borden to go to work on that job.

Q. Did he come and ask you to go to work on the job?

A. Well, he come by there one morning after he had left Galveston and he was there in the office, and after everybody got out, we were talking and he told—

Q. Just tell us what conversation you and Mr. Borden had at that time.

A. Well, that is about what we had—what I was going to say was, that he had told me as well as I remember, that he had come up here to Dallas, that he was going to be mechanical inspector on the Republic National Bank, and that he wanted me to get him a job out there and to hold him over until he could get on the bank job and I told him that I was full up, that I did not need any men at all.

[fol. 359] Q. All right, sir, now when you were down in Galveston, did you ever promise him a job on the Republic Bank Building up here?

A. No, sir.

Q. When he talked to you out here on the Veterans Hospital job, did you promise him a job either there or on the Republic Bank job?

A. I didn't have any authority to promise him a job on the Republic National Bank or any other job that I wasn't on.

Q. Did you do it whether you had authority to do it or not?

A. No, sir, I did not.

Mr. Wells: I believe that is all. Thank you, very much.

Cross examination.

By Mr. Klein:

Q. I understood your testimony, Mr. Roton, Mr. Herman Borden, the son of plaintiff here, was not fired from the job in Galveston?

A. Well, I don't know whether he was fired or just left so many times, he got disgusted and quit or left town, I don't know, but I know they wouldn't put up with his drinking on the job, is one thing.

[fol. 360] Q. Subsequent to that time you did hire him back?

A. Well, I don't think he was hired back, he never did know that he was discussed about being laid off or fired.

Q. All right. Now you said something a moment ago about Mr. Borden coming by to see you after he had left Galveston. When was that?

A. Well, I think the way I understood him, as well as I remember now, it was either within two or three days after that, after he had left the Galveston job.

Q. Now where were you?

A. I was out on the Veterans Hospital here in Lisbon in Dallas.

Q. Here in Dallas?

A. Yes, sir.

Q. Now do you remember when that was?

A. Well, yes, it was in the spring.

Q. Spring of—

A. '52—wait, I mean '53.

Q. All right. Now, you say—I probably misunderstood you, I thought you said he asked you to go to work on that job?

A. Huh?

Q. Did you say that he asked you if he could go to work on that job?

[fol. 361] A. Yes, sir, that is right.

Q. And that was in the spring of 1953?

A. Yes, sir.

Mr. Klein: That is all we have, Your Honor.

Mr. Wells: I believe that is all, thank you, very much. Now would you please call—

Mr. Klein: One other question, Mr. Roton.

By Mr. Klein:

Q. You were employed by Farwell up until the time you retired?

A. Until what?

Q. Up until the time you retired?

A. Yes, sir.

Q. And you retired two years ago?

A. Yes, sir.

Q. Have you retained your membership in Local Union 100?

A. Yes, sir.

Mr. Klein: That is all, Your Honor.

Mr. Wells: We call Mrs. Davis, please.

Judge, I thought of another matter I meant to ask Mr. Roton. I wonder if we can have him back before we put Mrs. Davis on.

The Court: All right.

Mr. Wells: I am sorry.

The Court: Step back outside, please, ma'am.

[fol. 362] Mr. Wells: Mr. Roton, I wonder if you would come back just a minute?

Lee Roton, being recalled, testified further as follows:

Direct examination.

By Mr. Wells:

Q. Mr. Roton, do you know Mr. A. G. Thurman?

A. A. T. Thurman?

Q. A. G. Thurman?

A. Yes, that is Walter's brother.

Q. Yes.

A. Yes, sir.

Q. Do you know how it was he happened to go to work on the Republic Bank Building?

A. Yes, sir.

Q. Will you tell that to the jury, please, sir?

A. Well, this kind of sounds kind of funny, but Zuefeldt, one morning he had more men looking down his neck than he could take care of, so he just sat down there and wrote them all out orders for that hospital job.

Q. That is the one where you were the superintendent?

A. Yes, sir. And I didn't need a man, and so, Thurman introduced himself to me and of course, I knew Walter, and I asked him to wait a few minutes there, and so he [fol. 363] waited a few minutes until all the fellows got away, and I said, "Thurman," I said, "I believe I can get you on down there at the Republic Bank if you want to go down there", I said, "Jack Heath is a special friend of mine, and if you want me to, I will call him and ask him." And he said, "Well, I would like to go down there." And so I called Jack and told him who Thurman was and told

him that I knew his brother well and that his brother was a good man, a good mechanic, and I said, "I believe this man will make you a good man", and so he said, "All right, you send him down here, he has already got a referral card and he won't have to come back through the local, so you just send him on down here to me", and so I sent him down there.

Q. Well, now, did Mr. A. G. Thurman indicate to you at that time that he already had some kind of a promise to come down to the Republic Bank Building?

A. No, sir, he didn't say that, and he didn't. I can tell you that.

Q. He then couldn't have made any promise down in Galveston, Texas, to get Mr. Borden on when he himself wasn't on?

A. Nor nobody else.

Mr. Wells: That is all, thank you very much.

Mr. Klein: We have no questions.

[fol. 364] The Court: Stand aside, please.

Mr. Wells: We will have Mrs. Davis, please.

DELLA PAYNE DAVIS, after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Wells:

Q. What is your name, please, sir?

A. Della Payne Davis.

Q. Della Payne Davis?

A. P-a-y-n-e (spelling).

Q. (spelling) D-a-v-i-s?

A. Right.

Q. Mrs. Davis, you are going to have to either lean up to that microphone or speak up a little bit so all the lawyers and the jury can hear you.

A. Surely.

Q. Do you live here in Dallas?

A. Yes, I do.

Q. How long have you lived in Dallas?

A. Since 1947.

Q. Are you now employed?

[fol. 365] A. Yes, I am.

Q. By whom?

A. Alford Plumbing and Heating Company.

Q. Did you used to work for Local Union 100?

A. I did.

Q. When did you work for Local Union 100?

A. 1951 and terminated in 1955.

Q. All right, now, let's skip over through to your present employment with Alford Plumbing Company, how long have you been there?

A. Three years.

Q. What is your function with Alford Plumbing?

A. Bookkeeping.

Q. Now as bookkeeper are you in charge of the books and records and the payroll records of Alford Plumbing Company?

A. I am.

Q. Then did I request you to obtain the original payroll records with respect to a Mr. Hall who testified here yesterday?

A. Yes, sir.

Q. Now there is some testimony in this record with respect to the year 1953 when Mr. Hall said he worked for Alford Company here in Dallas. What do the records of the Alford Company show as to when he worked here?

[fol. 366] A. He worked four weeks in July of 1953, I mean, in January, I am sorry.

Q. Well, let's look at the records. Do you have the original records with you?

A. Yes, sir.

Mr. Wells: Would you mark these as Defendants' next in order, A and B?

(Reporter marked instruments as Defendants' Exhibits 5 and Defendants' Exhibit Number 5A for identification.)

Mr. Wells: Mrs. Davis, I hand you what the reporter has marked for identification as Defendants' 5 and 5A, would you explain to the jury just what this is?

A. In December of '52—

Q. Excuse me, up at the top it shows the man's name and address, does it not?

A. Yes.

Q. And his social security number?

A. Right.

Mr. Klein: Have those been introduced?

Mr. Wells: Not yet.

Mr. Klein: Your Honor, I would like to take the witness on voir dire for a moment.

Mr. Wells: I think your objection is going to be a good one, if you make it, let me lay a predicate for it.

[fol. 367] By Mr. Wells:

Q. Mrs. Davis, you testified that you maintained the payroll records out there?

A. Yes.

Q. Will you describe to the Court what type of records are kept by Alford Company?

A. Well, this is the man's record of employment.

Q. And who makes that record?

A. I do, but I didn't make this record, I have just been working there since 19—I went to work there—three years.

Q. So any record there made in 1952 or 1953 would have been made by someone else?

A. Yes.

Q. Who was your predecessor there?

A. Mr. Morris was the bookkeeper.

Q. Do you recognize his handwriting notation?

A. I do.

Q. Are you regularly working with the books and records that are maintained in the Alford office relating to wages or conditions, or employment records relating to times prior to your employment there?

A. Yes, I am.

Q. And are Exhibits 5 and 5A certain of those records?

A. Yes, sir.

Mr. Wells: We offer them in evidence, if Your Honor [fol. 368] please.

The Court: Proceed.

Q. Now would you explain what this record shows up in the upper left-hand corner, the man's name and address, is that correct?

A. Yes.

Q. And this would indicate that first he gave an address from San Antonio, Texas, and later from—

A. Box 1065, Chandler, Texas.

Q. All right, now does the record show by particular days when the man worked?

A. We show only week endings.

Q. All right, and what week endings do you show him working?

A. On the week ending December 12th.

Q. Of what year?

A. 1952. He earned $21.00.

Q. And without the amounts, what weeks did he work, according to these records?

A. He worked December 12th and the week ending December 19th.

Q. Of 1952?

A. Of 1952, right.

Q. All right, and when in 1953?

A. In 1953, the week ending January 2nd, January 9th, [fol. 369] January 16th, 23rd and 30th.

Q. Now looking on these records at the places to indicate whether or not he worked for Alford in September or October or November or December of 1953, please tell the jury whether or not there was any indication that he was working at that time?

A. No, sir, this is our only record of employment.

Q. The last time he worked was in January 1953?

A. That is right.

Q. Thank you. Now, relating, Mrs. Davis, to the time when you were employed by Local Union 100, I believe you said that was from 1951 to '55?

A. That is right.

Q. And that would therefore include the period, the last three or four months of 1953. Now, what were your duties?

A. I was the secretary, Mr. Lanham's secretary at the time I went to work down there.

Q. Did you also keep the books?

A. Yes, I did.

Q. On occasion would you take dues from members when they came in?

A. Right.

Q. Would you explain to the jury what the physical setup of that office is, Mrs. Davis, or what the physical setup was [fol. 370] in the fall of 1953—first, it was on the second floor, let me get you started and you go on from there.

A. Yes, the second floor on South Ervay Street.

Q. There was some testimony yesterday with respect to a kind of wicket through which a member would come and pay his dues. Are you familiar with that?

A. Yes, sir.

Q. Where from that wicket was your desk?

A. Well, I would say it was about four feet or something like that from the window where they pay their dues.

Q. Did you normally face the window?

A. No, I didn't.

Q. But was your desk so situated that all you had to do was turn and reach to the window without even rising?

A. Right.

Q. In order that you might transact business with people through that window?

A. Yes, sir.

Q. Now on any occasion in September or October of 1953, did Mr. H. N. Borden here and Mr. Lanham have any loud words or any controversy there at that window?

A. No, sir.

Q. You see Mr. Borden sitting here?

A. Yes, sir.

[fol. 371] Q. If he had come up and banged on the window, or rapped on the window, were you in a position where you would have seen or heard it?

A. Yes, I would have.

Q. Actually, was there a closure to that window?

A. No, sir, it was open.

Q. Was there any door by which it could be closed?

A. Not that I remember, no, sir.

Q. Now did you see Mr. Borden out there at all?

A. Well, I would say that that is where I did see him, yes.

Q. Did you see him in Mr. Lanham's office on one occasion?

A. No, sir.

Q. All right, were you in a position to hear any conversation that went on when Mr. Borden and Mr. Lanham actually were in Mr. Lanham's office?

A. Well, not of a normal nature, I wouldn't have heard it.

Q. Well, where was Mr. Lanham's office from this wicket window and from your desk?

A. Well, Mr. Lanham's office was adjoining the office where I work.

Q. Was there a partition between the office in which you worked and Mr. Lanham's office?

[fol. 372] A. Yes.

Q. And was there a door between his office and your office?

A. Yes.

Q. That door could be closed for privacy in his office?

A. Right.

Q. So there may well have been a conversation in his office which you did not hear, is that correct?

A. That is right.

Q. Do you recall any specific conversation with Mr. Borden?

A. No, I do not.

Q. Did you ever write referrals?

A. Yes, sir.

Q. Whenever a call would come to you from an employer for a particular individual, would you refer that individual out to the job?

A. Well, that all depended on whether or not, if Mr. Lanham was in the office, he wrote the referrals, normally, and so I just wrote referrals when he was not in.

Q. Did Mr. Lanham ever instruct you not to refer Mr. Borden?

A. No, sir.

Q. Did you ever hear him instruct anybody not to refer

[fol. 373] Mr. Borden?

A. I did not.

Q. To your knowledge did Mr. A. G. Thurman ever make any request for any employee on the Republic Bank Building?

A. No, sir.

Q. Who did make the request for employees on the Republic Bank Building?

A. Well, the only one I talked to was Mr. Jack Heath.

Mr. Wells: May I have just a moment, Your Honor?

The Court: All right.

Q. Mrs. Davis, did you and I and Mr. Galvin make us a chart of that office this morning?

A. Yes, sir.

Mr. Wells: Would you mark this please for identification?

(Reporter marked instrument as Defendant's Exhibit 6 for identification.)

Q. Mrs. Davis, I hand you what has been marked for identification as Defendant's Exhibit 6. Is this a rough sketch which you, Mr. Galvin and I roughed out this morning as demonstrating the premises there at the office of Local 100 back in 1953?

A. Yes, sir.

Q. And is that accurate to the best of your recollection, I don't mean accurate in terms of feet, but in terms of [fol. 374] proportions and various locations?

A. Yes, sir, it is.

Mr. Wells: We will offer it in evidence.

Q. Now was the building in which the local was then situated at the corner of Ervay Street close to Grand Avenue?

A. That is right.

Q. And immediately south of Grand on the east side was another building?

A. Yes, sir.

Q. And then immediately to the south of that was the plumbers union building?

A. That is right.

Q. The plumbers union occupied the second floor?

A. That is right.

Q. And this is a rough sketch of the second floor, is that correct?

A. Yes, sir.

Q. Was the entrance on Ervay Street?

A. Right.

Q. Did that require coming in underneath the business manager's office, up the stairs and then back, turning the stairs half or three-fourths of the way up and then coming on up into the hall?

A. Yes.

Q. Now is—see, if I can get this where the jury can see it.

[fol. 375] Mr. Wells: Judge, could the witness come down to the table with us?

The Court: I suppose so.

Mr. Wells: Thank you.

Q. Now if I understand it then, Ervay Street is running from north to south here, is that right?

A. Yes.

Q. And Grand is running from west to east back this way?

A. Yes.

Q. And then this was a building unconnected with it?

A. That is right.

Q. With the plumbers union, and here is the plumbers union facing west on Ervay Street, is that correct?

A. Yes.

Q. Now was the entrance from the first floor at about the point where this arrow is shown under the R in Ervay?

A. Yes, I would say that it was, that that is the entrance.

Q. Then did the entrance go up half a flight of stairs and then require turning around and coming up to the second floor?

A. Right.

Q. Now when you got to the second floor, what was this [fol. 376] area through the middle of the paper here?

A. Just a hall.

Q. All right, and then there is in the—to the jury's upper left-hand corner, there is a room. Is that the room in which you had your office?

A. Yes, sir.

Q. There is shown on the plat two desks, one desk toward the south side of the room and another more toward the middle of the room. Who had the south side desk?

A. Mr. Zuefeldt.

Q. Was this your desk, then, more or less in the center of that room?

A. Right.

Q. And there is shown an identation into that office, an indentation off of the hall, was that the indentation—just explain to the jury what that was?

A. Well, it was just a little place where the members came in and had conversation with Mr. Lanham, or if they wanted to pay dues, they paid dues in there.

Q. All right, now there are two little round hickies here, what are those?

A. Well, that is the wicket that you had spoke of, I am sure.

Q. There was a wicket facing south and another wicket facing west, is that right?

[fol. 377] A. Well, now actually, I think this one right here, let's see, this was my desk, this one right here would have been the one where I was nearest, I don't know about that one over there.

Q. I see. Your recollection is about the one here?

A. That is right.

Q. And you sat to the east of the—between your desk and that wicket?

A. Yes.

Q. I see. Now, Mr. Lanham's office was where?

A. To—

Q. This direction is north.

A. Well, it was north, yes, sir.

Q. And it was in an entirely separate room, which had a separate entrance off of the hall?

A. Right.

Q. And also had a door which could go into yours and Mr. Zuefeldt's office?

A. Right.

Q. I see. Now what—I see some little hairlines coming up here, would you explain to the jury what those are, and I am referring to this little indentation?

A. Well, it was latticework.

Q. Was that solid or was it latticework through which you could see?

[fol. 378] A. It was latticework through which you could see.

Q. So you were in a position within three or four feet of the window which had no door, beyond that there was no solid wall, there was just latticework, through which you could have seen or heard?

A. That is right.

Mr. Wells: That is fine, thank you. That is all. Thank you, Mrs. Davis.

Cross examination.

By Mr. Klein:

Q. Mrs. Davis, possibly I understood—may I have that just a moment—possibly I understood Mr. Wells' question. I believe he asked you if during the year of 1953 Mr. Borden and Mr. Lanham ever had a loud conversation there in the union hall, and I believe you answered that they did not. Now you were not there all the time, were you?

A. No, sir.

Q. And they could have had any number of loud conversations when you were out on your coffee break or somewhere else than you—

A. Well, normally, I didn't take a coffee break, my hours were from 8:00 to 4:30.

Q. And you had no coffee break?

A. I didn't usually take one, no, sir.

[fol. 379] Q. All right, were you always in that office from 8:00 until 4:30?

A. Except for my lunch hour.

Q. All right. The only thing I don't see on this chart, Mrs. Davis, is a ladies' room, I see a men's room, but no ladies' room, where was the ladies' room?

A. Well, it was off to the side, where Zuefeldt, where it has Zuefeldt's desk, there was a ladies' restroom on the wall, next to the wall there.

Q. Yes, ma'am. Now this latticework that you have

testified about, that surrounded your—made an identation into the area where your desk was located, did that latticework run from the ceiling all the way to the floor?

A. No, it was from the—it was a desk like this where they put the dues in and it run from there up to the ceiling.

Q. All right, now, how many little windows were in that particular area where the latticework was?

A. Well, now actually, when I went to work there, there was just one, but they did make another window.

Q. That is the one that you didn't know anything about?

A. That is right.

Q. When did they put that one in?

A. Well, now that I don't remember.

[fol. 380] Q. All right, now the window that you knew something about, I believe it is on the south end, the one right at the front of your desk?

A. Yes, that is right near my desk, that is right.

Q. What sort of window was that, what did it look like?

A. Well, it was just a little oval-shaped thing, something like they have in any teller's window, or something where people put their dues book or money or whatever papers through there.

Q. And did you have any method of closing that window?

A. No, sir.

Q. All right, now, the other one they put in after you had gone to work there, what sort of deal was it?

A. Well, it was of the same construction, I mean, it was—

Q. Did you have any method of closing it?

A. No, sir.

Q. Those windows were always open?

A. That is right.

Q. Mrs. Davis, are you married?

A. No, I am not.

Q. And it is your testimony that the latticework in that indented area was not changed from 1951 through 1955 [fol. 381] other than by inserting that extra window?

A. Yes.

Q. Mrs. Davis, you went to work for Alford Plumbing Company in 1957?

A. Right.

Q. You don't have any personal knowledge of any pay records of Mr. B. C. Hall, do you?

A. None that I made myself.

Q. And your testimony here is that the only records you could find out there at this time of Mr. B. C. Hall are these that you have brought here at Mr. Wells' request?

A. Well, that is their permanent record for every employee, there is a breakdown sheet that would show what job he worked on to earn those wages.

Q. But I am saying that the only thing you have to go on with regard to whether or not Mr. B. C. Hall worked there any time other than January of 1953 is the fact that you did not find any other record?

A. No, sir, it would have been in those records had he worked.

Q. Well, I understand that, possibly, but the only thing you are basing your testimony on here with regard to the fact that Mr. Hall did not work there except in January?

A. That is right.

Q. Is the fact that you did not find any other record? [fol. 382] A. No, if he had, it would have been on that sheet, that goes to the Internal Revenue, that is what we make up our report to the Internal Revenue from.

Q. What is the Alford Plumbing and Heating Company?

A. Mechanical contractors.

Q. Who owns Alford Plumbing?

A. It is a corporation, Mr. W. H. Alford is president. Mr. C. G. Alford is vice president, Wanda Merrill Alford is secretary-treasurer.

Mr. Klein: That is all we have, Your Honor.

Redirect examination.

By Mr. Wells:

Q. Now, Mrs. Davis, I am referring to Exhibit 5 and 5A again, does this have a blank on it for the months of September, October, November and December, 1953?

A. That is right.

Q. Would you show the jury on here where those months are on these records for 1953?

A. Yes. This is January, February, March, April, May, June, July, August, September, October, November and December.

Q. And those are all blank except there are some totals?

A. For the year.

[fol. 383] Q. Sub-totals carried over for the month of January when he did work, is that right?

A. That is right.

Q. So this is actually the record for those months and there couldn't be any other record?

A. That is right, my Internal Revenue report will show the same.

Mr. Wells: That's all. Thank you very much.

Recross examination.

By Mr. Klein:

Q. Who put that year 1953 on the bottom of that particular card?

A. Well, that is my writing, because Mr. Morris during his lifetime had filed these in a filing cabinet out there, that are years beginning and ending, he has them in a manila folder marked the year in which the work was performed.

Q. So you are the one who designated that record as the record of 1953?

A. Yes.

Mr. Klein: That is all, Your Honor.

Mr. Wells: Your Honor, please, might we have a brief recess to look over our notes?

The Court: All right, we will have a ten minute recess.

[fol. 384] (Reporter's Note: Court reconvened following the recess at 4:13 p.m. at which time the following proceedings were had in the presence and hearing of the jury:)

Mr. Wells: May we proceed, Your Honor?

The Court: All right, proceed.

Mr. Wells: We call Mr. Pierce, please.

E. J. PIERCE, after being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Wells:

Q. Would you state your name, please?
A. E. J. Pierce.
Q. Where do you live?
A. 2301 Peidmont, Irving.
Q. And what is your business?
A. I am a steam fitter.
Q. How long have you followed that trade?
A. I have been in the UA since 1946, 20 let's see,—the 3rd of January.
Q. And where did you live before you came to Dallas?
A. In Tyler.
[fol. 385] Q. All right, are you a member of Local 100?
A. I am.
Q. And were you an officer of Local 100 in the year 1954?
A. I was a member of the executive board.
Q. Did you hold any office in 1953?
A. No, sir.
Q. You were elected in late '53 to take office in January of '54?
A. I was elected at the same time Galvin was elected, business manager.
Q. I see. Now it is already in evidence, I think, the names of the five members of the executive board, you and four others worked on that executive board?
A. Yes.
Q. Were you present at a meeting of that executive board on or about October 18, 1954, when Mr. Borden appeared before that board?
A. Yes, sir.
Q. Now up to shortly before that time, had you heard anything about Mr. Borden's complaints at all?
A. No, sir.
Q. All right, sir. Now I believe just to shorten it, I believe it is already in evidence that Mr. Galvin had asked,

sent a letter for Mr. Borden to come in before the execu-
[fol. 386] tive board. What conversation was had between the executive board and Mr. Borden at that time?

A. Mr. Borden come before the executive board and we asked him, we tried to get him to carry his case before—take the proper channels instead of carrying it to civil court.

Q. What did he say about that?

A. He said he had already turned it over to his lawyer.

Q. Now did he tell you what it was he was complaining about, all of the details that have been told here in court?

A. No, sir.

Q. What did he say about that?

A. Well, that has been a little bit long ago for me to remember, but the best that I can remember, is the chairman of the executive board told him that since he was going to file suit in a civil court, that there wasn't nothing we could do, so we adjourned the meeting.

Q. Did Mr. Borden offer to tell you what it was that Mr. Lanham had done or that Mr. Zuefeldt had done or about Mr. Thurman?

A. Not that I remember, no, sir.

Q. He just told you that he left the matter in the hands of his lawyer?

A. Yes, sir.

[fol. 387] Q. All right, sir, now Mr. Borden has indicated here that there were certain threats made to him of such a nature that he is still scared; at that meeting of the executive board were any threats of any kind made to him?

A. Not that I can remember, we didn't handle business that way.

Q. Was there any ugly talk to him about what would happen to him of any kind?

A. No, sir.

Mr. Wells: Your witness.

Cross examination.

By Mr. Klein:

Q. Mr. Pierce, as I understand your testimony, Mr. Borden simply came in before the board and said, I am going

to take it up with the—I am going to leave it with my lawyer, and take it through the civil courts, and you adjourned the meeting?

A. Not me, I didn't adjourn the meeting, I was just a member.

Q. The president?

A. Yes, sir.

Q. And that was all that was said and done at that particular meeting?

A. That was all.

[fol. 388] Q. And nobody knew what Mr. Borden was complaining about?

A. Not that I know of.

Q. You didn't take any testimony from Mr. Galvin, I mean, from Mr. Lanham in regard to what Mr. Borden was complaining about?

A. If we did, I don't remember it.

Q. Well, you have been here all day, haven't you, Mr. Pierce?

A. Yes, sir.

Q. Haven't you heard the testimony from Mr. Galvin?

A. I heard him.

Q. And from Mr. Lanham, that they investigated this thing and that they took it before the executive board and they listened to Mr. Borden and then they listened to Mr. Lanham and then they decided there was nothing there?

A. Yes, sir.

Mr. Wells: Now just a moment, the testimony was that they couldn't decide it, if Your Honor please, because the plaintiff wouldn't present his testimony there. I object to the question as assuming a state of facts contrary to the evidence.

The Court: It was argumentative, counsel.

By Mr. Klein:

Q. Did Mr. Lanham make any statement there that [fol. 389] night?

A. I don't remember it.

Q. You don't remember whether Mr. Lanham made a statement at all?

A. I sure do not.

Q. Why is it you don't remember whether or not Mr. Lanham made a statement but you do remember Mr. Borden did not make a statement?

Mr. Wells: That is argumentative, Judge, and we object.

The Court: Sustained.

Q. How long did that meeting last?

A. Well, it is according to what kind of business you have.

Q. No, I mean this particular meeting?

A. Oh, maybe fifteen or twenty minutes.

Mr. Klein: I believe that is all, Your Honor.

Mr. Wells: That is all. I recall Mr. Borden for further cross examination.

H. N. Borden, being recalled, testified further as follows:

Cross examination.

By Mr. Wells:

Q. You are the same Mr. Borden who has previously [fol. 390] testified and the plaintiff in this case?

A. I think I am the same one, what is left.

Q. Mr. Borden, were you here when your son testified about your intermittent work after the fall of 1954, the fact that you were so shook up you couldn't work much?

A. That is right.

Q. Do you recall in your deposition, given on April 30, 1960, in this case, that you testified on page 98, line 20, counsel, (reading) "I worked quite regularly after I went to work for the school board. I worked regularly." Did you so testify?

A. I did.

Q. Now, Mr. Borden, if I understood your testimony, when you were first on the stand, you testified in substance and in effect that when Mr. Galvin referred you to the

housing project sometime before your birthday in August of 1954 that that was not a very good job because you lost time because the weather was so bad, do you recall that testimony?

A. We lost time during the job, what time I was on the job.

Q. And you testified, you recall testifying just yesterday that the reason you lost that time was because the weather was so bad?

A. I beg your pardon, I didn't testify yesterday at all, [fol. 391] it was day before yesterday.

Q. Well, the record will show whenever you testified.

A. I could be wrong, but I don't think I—

Q. Well, you recall that testimony about the bad weather and so forth?

A. Yes, sir, I recall it.

Mr. Wells: Now I will ask the reporter to mark for identification as exhibit next in order U. S. Department of Commerce Weather Bureau Local Climatological Data for August, 1954, and a similar document for the month of September, 1954, and a similar document for the month of October, 1954.

(Reporter marked instruments as Defendants' Exhibits Nos. 7, 8 and 9 for identification.)

Mr. Klein: Your Honor, we are going to object to it unless it is authenticated, verified, it isn't signed, it isn't certified to, and I don't think there is anybody here who can interpret it.

The Court: Well, may I take a look at it.

Mr. Klein: Yes, sir.

Mr. Wells: Judge, I can get you the statute setting out the Weather Bureau, which authenticates these with respect to their admissibility or if you will give me time, I will get the weatherman in here, I think it is an imposition on the Court and the jury to require that at this point.

[fol. 392] Mr. Klein: Your Honor, we don't deny the thing could be made admissible, but I don't know how Mr. Wells plans to interpret the thing and if he is going to testify from it, we are going to object to it.

The Court: There is no certificate on it anywhere, is there?

Mr. Wells: May I have one of them, Your Honor.

The Court: Yes, sir.

Mr. Wells: There is merely the heading and the indication that it is available from the U. S. Government Printing Office, Superintendent of Documents, it shows the temperature, the precipitation, wind, sunshine, sky cover, by hours each day for the month, and is self-explanatory.

The Court: I think his objection is good. Sustain it.

Mr. Wells: Note our exception.

By Mr. Wells:

Q. Mr. Borden, do you recall whether or not during the month of August, 1954, that there was any rain?

A. Well, just specifically, I couldn't say what time it rained, but in answer to your question, I can tell you that altogether rain don't hold up a job of that type, there is foundations that have got to come that you lose time on, [fol. 393], there are buildings that has got to progress as the men progress, and so there is lots of time that men are off of the job waiting on carpenters or foundation men and so forth, that causes time to be lost on the job, plus what rain comes, for your information, that is because of what goes on at the job.

Q. As I recall your previous testimony, it was to the effect that the reason you felt the union had discriminated against you in referring you to this job was that the weather slowed you down, whereas, in the Republic Bank Building, the weather wouldn't have anything to do with it?

A. The weather wouldn't have anything to do with it on the bank building, the foundation or nothing else, it wouldn't have stopped us there because it was already gone.

Q. Isn't it true on the bank building or on any building, that work will fluctuate, you catch up with it and then there will come a layoff?

A. They do.

Q. And then they will catch up with some more and there will come another layoff?

A. They do that and put more on.

Q. Yes, well perhaps we can stop at this point, if you

will tell us that the weather didn't have anything to do with that job out there?

A. I didn't say that, I said it rained along there, that [fol. 394] rain would come and stop all the foundation work, but when the foundation stopped work, we didn't work.

Q. Do you dispute the fact, Mr. Borden, that there was only a trace of rain up through August 19, 1954?

Mr. Klein: Your Honor, we object to that question, he is simply—

A. I can't remember just when it rained out there now.

The Court: I overrule it and let him answer.

A. I couldn't answer the question on what day it rained or hour or minute.

Q. And do you recall that there was a trace of rain on the 19th day of August, 1954?

A. I couldn't say, I don't know.

Q. And then there was point—no, there was an inch and one tenth of rain on the 2nd day of August, 1954?

A. I couldn't say, it rained, I don't know what time.

Mr. Smith: We object to Mr. Wells interpreting—

The Court: I sustain the objection.

Mr. Wells: Well, we won't go through it then day by day but do you recall that the entire month of August 1954 there was a total of one—

Mr. Smith: We register the same objection Your Honor.

The Court: Well, I will let him put that question.

[fol. 395] Q. Well, do you recall that during the month of August, the entire month, there was a total of 1.6 inches of rain?

A. I wouldn't remember myself as to what time it was raining.

Q. You just don't have any information about that at all?

A. Remember the days of a rain?

Mr. Wells: I believe that is all.

Mr. Smith: No questions, Your Honor.

The Court: Stand aside.

Mr. Wells: Judge, we will rest subject to proving up this. We have just the one witness to prove up these documents the first thing in the morning, or I solicit a stipulation from counsel. There is no question about what they are.

(Reporter's Note: The attorneys confer with each other outside the hearing of the jury and the court reporter.)

Mr. Klein: Your Honor, we have no objection to the introduction of these instruments if it is stipulated that the gauges, or whatever they are on there cover only Dallas Love Field. I think that is what it says.

Mr. Wells: All right, that is agreeable, that is where the weather is taken.

The Court: All right.

[fol. 396] Mr. Wells: We understand they are received in evidence, Your Honor?

The Court: I understand that is the stipulation and that they are in evidence.

Mr. Wells: All right, defendant rests.

The Court: What says the plaintiff?

Mr. Smith: Plaintiff rests, Your Honor.

The Court: Well, bear in mind the instructions heretofore given you, members of the jury. The Court has to prepare a charge in the case and then the attorneys will have a reasonable time within which to object to it and all of that will take time, but bear in mind the instructions heretofore given you and be back at 10:00 o'clock in the morning. We will see where we stand. As soon as the charge is ready, why then it will be read to you and the case will be argued and you will deliberate on it, but as to you, we will stand recessed until 10:00 o'clock.

[fol. 396f]

PLAINTIFF'S EXHIBIT No. 6

CONSTITUTION

By-Laws
and Working Rules
of
LOCAL UNION No. 100
of the
UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA

Adopted by
LOCAL UNION No. 100
DALLAS, TEXAS

September 18, 1950

(Union Label)

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ARTICLE IV
DUTIES OF OFFICERS

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SEC. 5. The Business Manager, Financial Secretary, Treasurer, shall look after the business of this Local Union in a general way, and shall act as directed by instructions from Local Union meetings. He shall keep a record of all shop stewards, together with a list of all apprentices and their time at the trade. He shall call upon all shops and jobs and enforce the Local rules at all times. He shall make a complete report at every meeting. He shall keep a roll of

all members and their addresses; also a correct account of all members of Local Union No. 100, receive all money and pay it into the Treasury. He shall also make a monthly report of all members in bad standing. He shall handle all money of the Association attested by the President and the Recording Secretary, and pay out same only on order of Local Union No. 100 in legal form. He shall give surety bond of twelve hundred fifty ($1,250.00) dollars, said bond to be furnished by Local Union No. 100 and the President to be custodian of said bond. He shall employ an assistant to be known as Office Manager who must give surety bond of twelve hundred fifty ($1,250.00) dollars, said bond to be furnished by Local Union No. 100 and the President to be custodian of said bond.

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SEC. 7. The Executive Board shall between meetings have full and complete charge of all business of the Local Union. It may enforce and collect, all dues and assessments, transmit moneys, if so directed by the Executive Board of the United Association, and transact such other business as may be necessary for the welfare of the Union including the voting of strikes.

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SEC. 11. Shop and Job Stewards shall be appointed by the Business Manager or Business Agent at any time he may see the necessity for so doing. When the Shop or Job Steward is laid off then the member who has been longest on the job or in the shop succeeds him until another is appointed in his place. They must make shop reports at each meeting, giving names of each member working in shop. They shall examine all due books and Building Trades Cards of any new member coming into shop to work. Those refusing to show book or card will not be permitted to go to work unless having permit from Business Manager or Business Agent. Shop or Job Stewards failing to comply with these rules shall be assessed not less than five ($5.00) dollars.

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Sec. 13. It shall be the duty of each and every member of Local Union No. 100 to receive and sign for a copy of these By-Laws. Failure to do so shall subject members to an assessment of not less than one ($1.00) dollar.

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WORKING RULES

ARTICLE V.

REPORTING TIME

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Sec. 2. All work coming under jurisdiction of United Association shall be performed by members of the United Association in good standing only.

Sec. 3. No member of any firm shall be allowed to handle tools unless one or more journeymen are employed by the firm, his work must be done under the same terms, conditions and rules as journeymen members of Local No. 100. Only one member of firm will be allowed to handle tools, at any time.

Sec. 4. Journeymen Plumbers will not be allowed to install lead work of any description not wiped up by a member of Local Union No. 100. All soldered joints on lead pipe must be wiped round joints, wall or floor flanges or branch joints. Any member using soldering iron or lead pipe or making aerial cup joints will be assessed not less than two dollars ($2.00).

Sec. 5. Members will not be allowed to work with apprentices, juniors, or bosses without identification cards.

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Sec. 13. Journeymen will not be permitted to work on fabricated pipe unless work was done by U. A. members. Proof of fabrication be given Local Union 100 before welding work is started. Sufficient time be given for verification.

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SEC. 16. Any member working with or taking out an Apprentice, who is not a member of the U. A., shall be assessed not less than ten dollars ($10.00).

Apprentice shall work under the supervision of a Journeyman at all times. Members of Local Union No. 100 having Apprentices under their supervision and jurisdiction that violate this provision shall be assessed not less than twenty-five dollars ($25.00).

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SEC. 20. The Business Agent will have the right to investigate all shops who have signed agreement, the supervision and distributing of shop cards, and taking up same.

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BY-LAWS

ARTICLE I

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SEC. 4. Any member working as Journeyman Key Man or Foreman outside of the City of Dallas, Texas, shall have board paid and traveling expenses paid, time for traveling to be paid at the rate of straight time. City limits of Dallas, Texas, shall be those boundaries or limits designated and recognized at all times as such. Dallas contractor having a job in the jurisdiction of a Sister Local Union shall send from Local Union No. 100, one Journeyman who may work with the tools if he so desires. When as many as five (5) journeymen in any one trade classification are employed on any one (1) job or shop, one foreman, a member of this Local, shall be employed. Thereafter every ten journeymen employed shall have an additional foreman. Any member in charge of a job, giving instructions or laying out work for other members shall be classed as a foreman, receiving foremen's wage rate. When two or more foremen are employed, a general foreman shall be designated, re-

ceiving general foreman wage rate. All supervision must be members of Local Union No. 100 in good standing. Subject to Master-Union Agreement, Job or shop superintendents or general foremen shall give orders only to the foremen. Any member found working for less wages or longer hours than this Local provides will be assessed not less than twenty-five dollars ($25.00).

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SEC. 6. Journeyman will carry on work in a workmanlike manner under a company authorized foreman, providing he is a member of United Association and in good standing. Journeyman will not be discharged to make room for another journeyman of same qualification. Violation of this rule by employer shall be investigated by Executive Board of Local 100 to determine if cause is just, otherwise journeyman will be re-employed. In case of any Master Plumber or Steam Fitter claims faulty work has been done by any member, this matter must be referred directly to Local Executive Board and the said Executive Board's decision shall be final. No member shall voluntarily correct his mistakes on his own time. Any member violating this rule shall be subject to assessment from two dollars ($2.00) to twenty-five dollars ($25.00).

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SEC. 8. No member of Local 100 shall be permitted to work on any job where men other than members of the United Association are installing work which comes under the jurisdiction of the United Association.

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SEC. 10. Any one making application to join this Local Union shall pay from date of acceptance of application a fee amounting to $10.00.

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SEC. 14. All members coming here, who are known to be members of other Locals, and being without clearance card,

shall deposit $10.00 until such time as his record or account shall be paid in full and clearance card deposited with this Local.

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SEC. 16. The dues in this Local shall be five dollars ($5.00) per month, and must be collected by Financial Secretary. Local fines and assessments must be paid before dues. Only exception to be Section 21 of Working Rules.

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SEC. 21. When a member refuses to divulge information, which he is known to possess, regarding any grievance that is being investigated by other members of this body, he shall be assessed not less than five dollars ($5.00).

SEC. 22. Any member divulging the action of this Local Union to outside parties shall be assessed not less than twenty-five ($25.00).

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SEC. 30. Members shall not solicit work from any contractor or their representative. All employment must be procured through Business Office of Local Union No. 100. Violation of this section subject to assessment of not less than five dollars ($5.00). Job Stewards, Foreman or Superintendents not reporting these violations will be subject to an assessment of not less than five dollars ($5.00).

SEC. 31. Continued failure to comply with the Constitution and By-Laws of this Local Union shall render its members liable to suspension or expulsion, as three-fourths members may decide at any meeting.

SEC. 32. Names of all members of Local No. 100 being in arrears the amount of three months dues shall be read before the Local at a regular meeting. It shall be the duty of the Business Manager to notify said members of such delinquency and remove them from the job until such time as they shall appear before the Executive Board and receive permission to go back to work.

SEC. 33. When any member of the United Association working in the jurisdiction of this Local Union breaks his obligation to the United Association or to this Local Union or violates any of the laws of the United Association, or laws and working rules of this Local Union, charges may be

preferred against him by any member of the U. A. in good standing or any Local Union of the U. A. that has personal knowledge of the offense committed. The charges shall be made in writing to the Local Union stating with reasonable certainty the nature of the offense charged, the time and place of the occurrence, naming the witnesses and all other data, and it shall require a majority of vote of the Local Union to accept such charges and the charges must be signed by a member of the U. A. in good standing, a copy of the charges attested by the seal of the Local Union, signed by the Secretary of the Local, shall be immediately sent to the accused to his last known address on the books of the Local Union by the Secretary and this shall be deemed due notice, provided, however, that for the nonpayment of dues, or assessments, a member may be suspended or expelled without the formality of a trial as above set forth. When charges have been made and accepted as herein before provided, the entire matter shall be referred to the Local Executive Board for trial, and they shall without unnecessary delay summon the parties and try the case, provided that the accused may have ten days from the date of notice before being called upon to plead to the charges as specified.

SEC. 34. Any member who shall violate any of the laws of this Local, knowingly propose unworthy persons for membership, wantonly injure any property belonging to this Association, or refuse to obey the request of the President or any member who shall refuse to abide by the expressed will of the Local, shall be subject to an assessment not less than twenty-five dollars ($25.00) or expulsion.

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SEC. 42. These By-Laws shall go into effect immediately on adoption, and shall remain in full force and effect thereafter unless amended or repealed as provided herein. All other By-Laws, Rules in conflict herewith are hereby null and void.

SEC. 43. Local Union No. 100 recognizes that the recently enacted Federal and Texas State Laws have not been judicially interpreted and construed and some term or provision of this Constitution, By-Laws and Working Rules may possibly be held to be violate of some of these laws. It is the purpose of Local Union No. 100 to comply with said laws; should, however, any term or provision of aforesaid Constitution, By-Laws or Working Rules be judicially determined by an Appellate Court with jurisdiction to so pass on such matters, be violative of afore mentioned laws such terms and provisions afore mentioned of Local Union No. 100 shall there-upon immediately become inoperative and

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stricken out; but the invalidity of any afore mentioned term or provision shall not invalidate or destroy or in any manner affect the other portions, terms or provisions of the Constitution, By-Laws or Working Rules of Local Union No. 100 and shall remain in full force and effect.

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fol. 396g]

PLAINTIFF'S EXHIBIT No. 7

CONSTITUTION

(Emblem)

BY-LAWS, RULES OF ORDER AND JURISDICTION

of the

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA

Composed of Journeymen and Apprentices Who Have Jurisdiction Over Every Branch of the Plumbing and Pipe Fitting Industry

Affiliated with American Federation of Labor, Building and Construction Trades Department, Metal Trades Department, Railway Department, Union Label Trades Department, Dominion Trades and Labor Congress of Canada

REVISED AND AMENDED AT KANSAS CITY, MO.

SEPTEMBER 10-14, 1951

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PREAMBLE

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As an earnest proof that we entertain a true sense of our obligations, interests and duties toward one another, each member should make himself thoroughly acquainted with the laws herein contained, that he may avoid imposing upon the same, and also be prepared to use his influence on those who do not as yet belong to the Association, but whose only reason for not belonging to it is that the benefits

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offered have never been fully explained to them. Above all, members should avoid becoming in arrears. Large numbers, which should insure "strength," very frequently produce weakness, because those in arrears are debarred from the benefits, and also make it impossible to meet the claims which are made by members who are in good standing.

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CONSTITUTION

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Trade and Territorial Jurisdiction

Sec. 2. The jurisdiction of territory of the United Association embraces the United States and the Dominion of Canada, and its trade jurisdiction shall include all branches of the pipe fitting industry. In it alone is vested the power to establish Local Unions, and its mandates must be obeyed at all times and under all circumstances. To the United Association of the United States and Canada is reserved the right to decide all matters pertaining to trade and territorial jurisdiction of its affiliated Local Unions, and no Local Union is conceded territorial jurisdiction other than the current working day in said territory, while to Local Unions is conceded the right to make necessary laws and agreements for local government which do not conflict with the laws of the United Association.

Sec. 2(a). *Membership.* The United Association of Journeymen and Apprentices of the United States and Canada, having full and exclusive trade jurisdiction over the plumbing and pipe fitting industry, shall be composed

of Journeymen and Apprentices of one craft without jurisdictional lines of demarcation.

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SEC. 2(b). *Abolishment of Trade Lines.* That there shall be one trade craft in the plumbing and pipe fitting industry for all Journeymen and Apprentice members of the United Association and all Journeymen members shall be permitted without restriction or bar to perform all work governed by the trade jurisdiction of the United Association; all Apprentice members of the United Association shall, under the supervision and control of Journeymen members, be permitted without restriction or bar to perform all work covered by the trade jurisdiction of the United Association.

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SEC. 60. The funds of the United Association shall consist of $1.25 of each member's monthly dues; 50 per cent of all $20.00 initiation fees, $1.00 reinstatements, $5.00 reinstatements and entire amount of $3.00 charter fees on each charter member, together with sum total of all United Association assessments levied by the General Executive Board, also the total amount of $2.00 for renewal of withdrawal cards. Raised dues, initiation fees and assessments imposed by Local Unions for non-attendance at regular meetings and assessments imposed for failure to do committee work or attend authorized meetings in the interest of the Local Union, shall be placed in the Local funds; said assessments to be a minumum of 50 cents and maximum of $5.00 for any one offense.

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FORWARDING MONEYS TO THE GENERAL OFFICE

SEC. 65. Each Local Union shall forward to the General Office not later than 48 hours after the last day of the calendar month $1.25 of each member's monthly dues; 50 per cent of $1.00 reinstatement fees, $5.00 reinstatement fees on depositing of withdrawal cards and $20.00 initiation fees; the sum total of all $2.00 withdrawal renewals and U.A. assessments; upon the original cash sheets furnished by the General Office, same to be countersigned by the Presi-

dent and Financial Secretary of the Local Union with seal attached, duplicate cash sheets to be retained by the Local Union.

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SEC. 66. Any Local Union failing to report to the General Secretary-Treasurer within 48 hours after the last day of the calendar month shall be notified by the General Secretary-Treasurer to do so, and failing to comply within ten (10) days from such notification, the Local Union shall stand suspended from all benefits.

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LOCAL UNION OFFICERS AND THEIR DUTIES

SEC. 97. Each Local Union shall elect a President, Vice-President, Recording Secretary, Financial Secretary, Treasurer, Inside Guard, Executive Board of five members, and a Finance Committee of three members. A Building and Construction Trades Local Union and Combination Local Union shall also elect an Examining Board to examine and qualify all Journeymen for membership and work in the Building and Construction Trades Industry. Each Local Union of the United Association has the right to elect one or more of their own members as Business Agent or Business Manager, and when they are elected they shall be considered as an Officer of the Local Union.

SEC. 98. The President shall preside over all meetings and conduct the same in conformity with rules of order and common sense. He shall have a general supervisory control over all matters pertaining to the welfare of the Local Union. The President shall be ex-officio over all committees.

SEC. 99. The Vice-President shall be chairman of the Local executive board and have supervision over all mem-

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bers entering the assembly room and upon a member presenting his due book in good standing he will give him the password. He shall also have supervision over all members departing from the room; assist the President to keep order during meetings, and in the absence of the President will assume the chair.

SEC. 100. The Business Agent and/or Business Manager meets in daily contact with the public and with employer,

becoming the Trustee of the welfare of the members of the Local Union. It is his solemn duty and obligation to vigilantly protect the trade jurisdiction of the United Association in the Plumbing and Pipe Fitting Industry of his locality; also to compel employers to observe and respect collective bargaining Agreements, adjusting all grievances between members of his Local Union and their employers with justice and fairness, as well as fostering and promoting employment for the members of the Local Union.

SEC. 101. The Recording Secretary will keep a correct and intelligent account of all transactions, resolutions and motions and the general business of the local meetings, and any other duties, special or otherwise, that may devolve upon him by action of the Local Union or the United Association. He will answer all communications and keep a copy of all important letters that may be sent out by him.

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SEC. 105. The Financial Secretary shall keep a correct account of the financial standing of all members of the Local Union, receipt and account for all moneys received or disbursed by order of the Local Union. He shall not later than 48 hours after the last day of the calendar month forward to the General Office $1.25 of each member's monthly dues; 50 per cent of all $1.00 reinstatement fees, $5.00 reinstatement fees on depositing of withdrawal cards and $20.00 initiation fees; the sum total of $2.00 for renewal of withdrawal cards and all U.A. assessments; upon the original cash sheets furnished by the General Office, with the seal of the Local Union attached, the same to be countersigned by the President and Financial Secretary, the duplicate cash sheet to be retained by the Local Union, subject to the inspection of the Finance Committee. The Secretary shall record on the cash sheets the names of all members who have been initiated, reinitiated and reinstated on the

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depositing of withdrawal cards, as well as the renewed withdrawal cards and clearance cards which have been accepted.

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SEC. 108. The Financial Secretary shall issue clearance cards immediately on receipt of full amounts of money due the Local by any member. Upon failure to send clearance within ten days after receipt of same, he shall be assessed by the General Office not less than $5.00 and not more than $25.00 for each and every offense, and he shall not issue more than one clearance card to any one member under the same date. Upon violation of this rule, he shall be assessed

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not less than $5.00 for each and every offense.

SEC. 109. The Financial Secretary shall require all members to affix their signatures upon the membership Roll Book, also upon the front page of Due Books and on clearance cards.

SEC. 110. The office of Financial Secretary and Treasurer may be combined into one office to be known as Financial Secretary-Treasurer if the interests of the Local are benefited thereby.

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SEC. 112. Every Local Union shall elect an Executive Board of five members, which shall include the Vice-President of the Local Union who by virtue of his office shall be a member thereof and Chairman of the Executive Board. They shall meet at least once in every week, and the Local Executive Board shall be empowered to comply with the direction of the General Executive Board of the United Association as provided in these laws.

SEC. 113. The Local Executive Board shall between the meetings of the Local Union have full and complete charge of all business of the Union, may enforce and collect all

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dues and assessments, if so directed by the General Executive Board of the U.A. and transact such other business as may be necessary for the welfare of the Union.

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MONTHLY DUES

SEC. 122. The dues of each Local Union member shall not be less than two dollars and twenty-five cents ($2.25)

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per month. The dues of a new member shall commence from the date of initiation. Members initiated in any Local Union before the 20th of the month shall pay dues for that month. On and after the 20th of the month, the dues shall commence on the first of the following month.

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DUE BOOKS

SEC. 133. All due books shall be issued by the General Secretary-Treasurer from the headquarters of the United Association and shall be consecutively numbered in rotation of date of membership. When a member has joined the United Association he shall procure from the General Secretary-Treasurer through the agency of the Local he has joined a Due Book for the receipt of his initiation and

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monthly stamps. It shall be properly numbered and bear the name of the member and designate the type of Local Union to which he belongs. The member must sign his name in ink on the front leaf of his Due Book in place designated for same, which indicates that he has signed the Constitution and is willing to abide by all laws and discipline enacted by the Local Unions and the United Association.

SEC. 134. As soon as a member has paid his dues he shall receive from the Financial Secretary one stamp for each month's dues he has paid, and the stamp or stamps thus received must be properly cancelled by the Financial Secretary and pasted in his Due Book.

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NO PERMITS

SEC. 153. No permits shall be given or issued to anyone (by any Local Union or representative thereof) who is not a member of the United Association or who has not been accepted by the Local Union and is paying an application

fee for admittance to the United Association. Upon failure to comply with this section Local Unions will be subject to discipline according to the Constitution by the General Executive Board.

Clearance Cards

Sec. 154. There shall be a card known as a clearance card, issued to members in good standing who may desire to clear from one Local to another. Said card to be signed by the member who receives it in the presence of Secretary

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issuing same. Upon the member depositing this card he shall again be required to sign his name in the presence of the Secretary receiving it for identification purposes. The Financial Secretary shall forward all clearance cards to the General Office within 48 hours after acceptance of same by Local Union. For failure to comply with this section the Financial Secretary shall be assessed not less than $25.00 nor more than $50.00.

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Sec. 156. Members securing and holding clearance cards from a Local Union of the United Association must report either in writing or person or deposit his clearance card within thirty days from the date it was issued to the nearest Local Union wherein he may be located. Any member failing to comply with this law shall be liable to an assessment; suspension or expulsion from the United Association.

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Sec. 158. Clearance cards will be issued only to first class Journeymen of a Building and Construction Trades Local Union, Metal Trades Local Union, or a Combination Local Union. Clearance cards issued to a Journeyman holding a membership in the Building and Construction Trades Local Union can be deposited by said Journeymen in either a Building and Construction Trades Local Union or in a Metal Trades Local Union and a clearance card issued to a Journeyman member of a Combination Local Union working in the Building and Construction Trades Branch of said

Combination Local Union may be deposited by said Journeyman member in either a Building and Construction Trades Local Union or a Metal Trades Local Union. A clearance card issued to a Journeyman member of a Metal Trades Local Union or a Metal Trades Journeyman member of a Combination Local Union can only be deposited in a sister Metal Trades Local Union or in the Metal Trades Branch of the Combination Local Union and cannot be deposited in a Building and Construction Trades Local Union. When a clearance card is deposited in the proper sister Union as above set out by a Journeyman member, the sister Local upon the presenting of the card by the Journeyman member must accept said clearance card, and the member must be permitted to work unless there is a strike or lockout in the locality. When a member deposits

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a clearance card in a proper sister Local as above set out in this section, he shall not be subject to "waiting lists" which are hereby declared illegal. Nor shall any monetary contribution be accepted from him for the privilege of working. The clearance card of at least one Journeyman member sent from his own Local to install work in the jurisdiction of a sister Local Union, must be accepted and the member permitted to work with the tools if he so desires. He shall not be subject to examination by that Local to which he presents his clearance card.

A Local Union may refuse to accept a clearance card if the member presenting the clearance card secured membership in the United Association in an illegal manner, by misrepresentation, false statement, fraud or contrary to the Constitution of the United Association, provided, that no question can be made by any Local Union as to the legality of the membership where an individual has been a member for three or more years. Any Local Union refusing to accept such clearance card must, within forty-eight (48) hours, submit the case to the General President or the General Secretary-Treasurer, together with all the evidence of the illegality of the membership of the individual presenting the clearance card for a decision.

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SEC. 160. When a member enters a locality where there is a Local of the United Association, and has no due book, —75— or clearance card, he shall be required to deposit the sum of ten dollars ($10) as a guaranty of good faith.

SEC. 161. It shall then become the duty of the Secretary of the Local where the deposit is made to inquire into his standing. If the member is found to be in good standing, so much of the money deposited as shall not be required to keep him clear on the books of the Local to which he is attached shall be returned to him, but not until his clearance card has been received.

SEC. 162. Locals are empowered to charge dues to a member of another Local as soon as he accepts employment in their locality, and the account of such member shall close with the Local to which he is attached as soon as the Local under whose jurisdiction he is working has sent advertisement of the arrival and employment of the member in their locality.

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SEC. 165. Members carrying clearance cards shall pay all their arrearages from date of card to the date the same has been deposited with the Local to which he wishes to become attached.

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SEC. 168. Members holding clearance or withdrawal cards who wish to deposit the same must have been members of the U. A. for at least 12 months. Or be required to pay the increased difference in initiation fees of the Local to which he was previously attached, and the one to which he applied for admission. This shall also include reinitiated members.

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SEC. 170. Any officer of a Local Union, who receives moneys from a member, while the record of a member is in another Local Union, without sending said moneys to

the Local Union wherein the record of the member is, shall be assessed the sum of $25.00 for the first offense, and any Local Union that permits its records to be so written that it will show that the moneys have been credited to a member while his card is in another Local, shall stand suspended from membership in the United Association.

Traveling Members to Report to Local Officers

Sec. 171. Any member of the United Association accepting employment under the jurisdiction of sister Locals before reporting to the proper officer of such Local Union and depositing his clearance card, informing him of his intention of accepting employment under the jurisdiction of said Union, shall be assessed a sum not to exceed $25.00.

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Unjust Discrimination of Members

Sec. 181. Any officer or member of the United Association found guilty of unjust discrimination against members of the United Association because of their affiliations or non-affiliations with fraternal societies or otherwise wherein such unjust discrimination causes members to lose their employment or not able to secure employment, these aforesaid guilty officers and members shall be disciplined by either assessment, suspension or expulsion from the United Association, in accordance with Sections 183, 184 and 185.

Prohibited to Work

Sec. 182. No member of the United Association shall be permitted to work on any job where men other than members of the U. A. are installing work which comes under the jurisdiction of the United Association; Local Unions failing to comply with this law shall be subject to discipline in the form of an assessment, suspension or expulsion, by the President of the United Association, regardless of any agreement between employer and employee, except where, in the judgment of the General President of the U. A., it is deemed otherwise.

Offenses and Penalties

Sec. 183. When a member of the United Association breaks his obligations to the United Association, or any of
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its Local Unions, or violates any of the laws of the United Association, or laws and working rules of any Local Union, charges may be preferred against him by any member of the U. A. in good standing or any Local Union of the U. A. that has personal knowledge of the offense committed. The charges shall be made in writing to the Local Union to which the member may be attached, stating with reasonable certainty the nature of the offense charged, the time and place of the occurrence, naming the witnesses and all other data, and it shall require a majority of vote of the Local Union to whom the charges are preferred to accept such charges and the charges must be signed by a member of the U. A. in good standing; a copy of the charges attested by the seal of the Local Union, signed by the secretary of the Local, shall be immediately sent to the accused to his last known address on the books of the Local Union by the secretary and this shall be deemed due notice, provided, however, that for the non-payment of dues, or assessments, a member may be suspended or expelled without the formality of a trial as above set forth. When charges have been made and accepted as hereinbefore provided, the entire matter shall be referred to the Local Executive Board for trial, and they shall without unnecessary delay summon the parties and try the case, provided that the accused may have ten days from the date of notice before being called upon to plead to the charges as specified.

Sec. 184. The Local Executive Board will report their findings at the next regular meeting of the Local Union. If the accused is found guilty, he may be assessed, sus-
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pended or expelled, and if the verdict is expulsion, there shall be a set assessment or raised initiation fee also placed against him to indicate upon what terms the expelled member may again become a good standing member of the U. A.

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[fol. 396h]

PLAINTIFF'S EXHIBIT No. 8

AGREEMENT

STATE OF TEXAS)
COUNTY OF DALLAS)

This Agreement, entered into this 30 day of June, 1953, between the Mechanical Contractors Association of Dallas, Inc., and Local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, governing working conditions and wages of members of Local Union No. 100 when employed by members of the Mechanical Contractors Association of Dallas, Inc.

ARTICLE I

WAGE SCALE

The minimum wages for all employees doing work within the jurisdiction of the Union are:

Plumbers, Pipe Fitters and Steam Fitters—

Journeymen $2.90

Apprentices—

1st 1000 Hours—35% of Journeymen's Rate
2nd 1000 Hours—45% of Journeymen's Rate
3rd 1000 Hours—50% of Journeymen's Rate
4th 1000 Hours—55% of Journeymen's Rate
5th 1000 Hours—60% of Journeymen's Rate
6th 1000 Hours—65% of Journeymen's Rate
7th 1000 Hours—70% of Journeymen's Rate
8th 1000 Hours—75% of Journeymen's Rate
9th 1000 Hours—80% of Journeymen's Rate
10th 1000 Hours—85% of Journeymen's Rate

It is further agreed by both parties that the wage rates set forth above are to be put into effect on July 1, 1953, and that if approval is subsequent to July 1, 1953, the wage rates so approved shall be paid retroactive to July 1, 1953.

ARTICLE II

SETTLEMENT OF DISPUTES

It is recognized by both parties that the purpose of this Agreement is to maintain and strengthen harmonious and amicable working relationships between the members of Local Union No. 100 and the members of the Mechanical Contractors Association of Dallas, Inc., thereafter, a procedure for settlement of any dispute arising under this Contract by negotiation and/or arbitration, shall be developed jointly by the members of the Joint Conference Board of the Union and the Association, within 30 days after this agreement is executed, and such procedure shall be reduced to writing and copies furnished to both parties by the Joint Conference Board, and the same shall become a part of this Agreement, to remain in effect so long as this Contract remains in effect.

ARTICLE III

HAND TOOLS

The employer shall furnish all tools necessary to make a complete plumbing, heating, piping, refrigeration or air conditioning installation. The employer shall identify, by appropriate methods, the hand tools which he furnishes to the individual employee. The individual employee hereinafter agree to sign an itemized listing of all hand tools furnished him. The individual employee further agrees to pay for all hand tools lost or unaccountable at the time of lay off or discharge. The cost of any hand tool lost or unaccountable shall be determined by the individual employee and his employer taking due notice of the age, condition and other pertinent factors of the hand tool. The employer hereby agrees to furnish the individual employee with a suitable tool box, complete with lock and key, in which to store the hand tools for which the individual employee has signed an itemized list of such hand tools. Responsibility for the replacement of tools which are broken or worn out remains with the employer. Any disputes which may arise regarding hand tools shall be referred to the Joint Arbitration Board, whose decision shall be final. The

Joint Arbitration Board shall consist of 2 members from Local 100, 2 members from the Mechanical Contractors Association of Dallas, Inc. The fifth member of the Joint Arbitration Board shall serve as the Chairman and shall vote only in case of a tie. The Chairmanship shall alternate, every other meeting, between the President of Local 100 and the President of the Mechanical Contractors Association of Dallas, Inc. The Joint Arbitration shall meet as often as is necessary. Either the President of Local 100, or the President of the Mechanical Contractors Association of Dallas, Inc. shall have the power to call a meeting of the Joint Arbitration Board upon furnishing the other President with a written request for such meeting, with at least 5 days notice.

ARTICLE IV

PAYMENT OF WAGES

All employers who are a member of the Mechanical Contractors Association of Dallas, Inc. may pay by check drawn on a Dallas bank, in lieu of cash. In the event any employee is paid by a check which is not honored by the bank upon which it is drawn, then such employee shall be compensated, at double his regular rate of pay, from the time the employee receives the check until such time as the employee receives cash for the check. All employers other than members of the Mechanical Contractors Association of Dallas, Inc. shall pay their employees in cash.

ARTICLE V

DURATION OF AGREEMENT

It is further agreed by the parties hereto that the effective date of this agreement shall be July 1, 1953, and this Agreement shall remain in effect until July 1, 1954, and from year to year thereafter, unless either party gives written notice to the other at least sixty (60) days prior to its expiration.

It is further agreed that the established working conditions and trade practices of the Union and the employers

which were in effect on June 1, 1953, shall not be changed in any manner which increases the operation costs of the employer, except by mutual agreement of both parties to this Contract, during the life of the Contract.

Signed and agreed to this 30 day of June, 1953.

MECHANICAL CONTRACTORS ASSOCIATION OF DALLAS, INC.

By (Sgd.) A. B. CARTER

(Sgd.) SAM P. WALLACE

LOCAL UNION NO. 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA

By (Sgd.) FRED ZUEFELDT

(Sgd.) JOHN F. CULLEM

[fol. 397]

IN THE COURT OF CIVIL APPEALS OF TEXAS

FIFTH SUPREME JUDICIAL DISTRICT

From a District Court of Dallas County

No. 15,930

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, et al., Appellants,

vs.

H. N. BORDEN, Appellee.

OPINION—February 9, 1962

This is a damage suit brought by Borden, appellee, against two unincorporated labor unions—appellant Local 100 and the parent body of similar name. Borden sought money damages both actual and punitive, for loss of earnings and mental anguish, arising out of allegedly wilful, malicious and discriminatory course of conduct of the two unions; same consisting of the refusal of the unions to treat appellee as any other union member and to refer him to a job offered him in the construction of the Republic National Bank Building. His suit is based on allegations involving both tort and contract.

This suit had been previously dismissed by the trial court on plea in abatement, and on appeal to this Court, was reversed and remanded to the trial court for trial to the merits. On writ of error granted by our Supreme Court, the opinion of reversal was affirmed; it holding that a cause of action would lie if plaintiff "was wilfully denied a job opportunity to which Lanham, the Local Union Business Manager, knew he was entitled under the rules and procedures established by petitioners for allocating work among their members, and that petitioners either conspired [fol. 398] with Lanham to bring this about or otherwise authorized or ratified his wrongful conduct * * *." United

Association of Journeymen, et al. v. Borden, Tex. Sup. Ct., 328 SW 2d 739; see also 316 SW 2d 458 for further background of case and conclusions of this Court.

The facts material to appellee's claim of injury are generally outlined in the following summary of the numbered jury issues and answers: (1) that on or about Sept. 16, 1953 plaintiff Borden was promised a job on the Republic National Bank Building by the authorized foreman of the Farwell Construction Company; (2) that at a time when plaintiff was available for work, a call was placed by A. G. Thurman calling for plaintiff to go to work upon said Republic Bank Building; (3) that defendant Local Union 100 by and through its business manager Cleo Lanham, thereafter did not refuse to accept plaintiff's clearance card from his local union in Shreveport, Louisiana; (5) that said defendant Local Union 100 wrongfully refused to let plaintiff work on said Republic Bank Building; (6) that such refusal was made at a time when said Cleo Lanham knew that under the rules of said local union plaintiff was entitled to work on said bank building; (7) that such refusal to let the plaintiff work on said bank building was *not* without any cause or reason whatsoever; (8) that with full knowledge of the conduct of Cleo Lanham concerning plaintiff, the officers and members of defendant Local Union 100 approved such conduct; (9) that had plaintiff been allowed to work on the Republic Bank Building from Sept. 15, 1953 to Sept. 15, 1954 he would have earned $5,856; (10) plaintiff earned, or by use of reasonable diligence, could have earned during same period the amount of $3,940; (11) that plaintiff, by being denied the Republic Bank job opportunity, suffered mental anguish; (12) which was proximately [fol. 399] caused by defendants Local Union 100; (13) reasonable compensation for the mental anguish suffered was $1500; (14) that plaintiff should be awarded $5,000 as punitive damages against defendant Local Union 100; (15) that plaintiff, after having been r[illegible]ed the job opportunity to work on the Republic Bank Building, *did fail* to pursue his grievance within the rules and procedures of said Local Union 100 that were available to him; (16) that plaintiff voluntarily accepted other work in October 1953 upon referral from defendant Local 100 without complaint; (17)

but that plaintiff *did not* acquiesce in defendant Local 100 actions; (19) plaintiff *did not* fail to apprise defendant Local 100 of his complaints; (22) that it would have been useless for plaintiff to have pursued his complaint within the rules and procedures of the defendant Local 100.

In this connection the court overruled the motion for summary judgment of Local Union 100 seasonably filed and carried along to close of evidence; also its motion for judgment on the verdict; and in the alternative, its motion for judgment non obstante veredicto. Plaintiff's motion to disregard jury answer to issue No. 7 and for judgment on remainder of the jury verdict was sustained; holding however that in a suit of this type the issue of mental anguish was not raised and should not have been submitted; also that the amount of the punitive damages so found was excessive; and that plaintiff should be required to reduce the punitive damages to an amount not exceeding the actual damages sustained, or a total judgment of $3,832 to which plaintiff duly excepted, defendant Local Union 100 likewise excepting to all of above adverse rulings. A peremptory instruction had been given in favor of the parent union [fol. 400] to which plaintiff duly excepted.

Appellant again asserts exclusive application of 29 U.S.C.A. § 151, et seq., (Taft-Hartley Act) to this lawsuit. (Footnote).

In this plea to the jurisdiction it is argued that answer to Issue No. 5—wilful refusal of defendant Local Union 100 through Lanham that the plaintiff work on said Republic Bank Building—constituted an unlawful labor practice within provisions of Section 158 (b) which reads: "It shall be an unfair labor practice for a labor organization or its agents * * * '(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section * * * '. The material part of subsection (a) (3) of § 158 reads as follows: 'It shall be an unfair labor practice for an employer—' (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:' * * * ."

The suit of Borden as already stated was based on both contract and tort. Even if Borden be considered an em-

ployee, which appellee denies, Farwell Construction Company, the contractor and employer, was not a party to the suit and there is no evidence that it practiced any discrimination against Borden or treated him anywise different from other employees. He was simply offered a job and requested to obtain a referral from Local Union 100 as were all other employees of Farwell. By plain wording of the Act, the discrimination must be limited to purpose of encouragement or discouragement of membership in the union and plaintiff was already a member. This is a suit for wrongs allegedly committed against plaintiff by arbitrary [fol. 401] conduct of Local Union 100; and as held in International Association of Machinists v. Gonzales, 356 U.S. p. 617, 78 Supreme Ct. 923, the Labor Management Relations Act does not displace state court jurisdiction over suits to determine and enforce rights of union members in their union. In the cited cases it is stated: "But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to §8 (b) (1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * * '". The point is again overruled.

Appellants' further points should now be stated: Of court error; (2) because Lanham had no duty to refer Borden to the job site as requested; (3) because the denial by Lanham of a referral was not the cause for Borden's failure to obtain employment at the Bank site; (4) because the union was not responsible for Lanham's acts; (5) in admitting into evidence inflammatory, irrelevant and incompetent evidence; (6) because the finding of Thurman's authority to hire was contrary to the great weight and preponderance of the evidence; (7) in not barring the plaintiff's recovery because of his failure to exhaust remedies within the union; (8) in not finding that the plaintiff was barred from recovery by laches and/or estoppel; (9) in awarding punitive damages; (10) in not setting aside the verdict and declaring a mistrial because the jury's answer to Special

Issue No. 5 contradicted and conflicted with the jury's answer to Special Issue No. 7. All of above points were appropriately countered by appellee.

[fol. 402] Local Union 100 is an unincorporated association of some 800 membership in 1954, plaintiff being a member of that union. Members of one Local of the parent association can transfer to any other Local if in good standing. A clearance card is a devise by which a home local certifies that a member is in good standing. When this card is presented to a local under whose auspices the member seeks to work, the member is in all respects transferred to that Local. A member may also commence work in a certain locality by placing a deposit with the Local Union and later securing his clearance card.

A resume of material evidence bearing on all points and counterpoints (though generally disputed) is presented in the brief of appellee: that in mid-September 1953 Borden arrived in Dallas and called Jack Heath, superintendent for Farwell Construction Company. He had previously worked for this company in Galveston, being there told that he could work for said company on the Republic job site. On coming to Dallas Borden then presented his dues book to Lanham, business manager of Local Union 100; Lanham then telling him that he had come to Dallas "with a job in his pocket" and refused to accept Borden's dues book, further telling him that he would never go to work on the Bank Building and that the best thing for him to do was to get out of town. It was undisputedly the uniform practice of Local Union 100 that in case a particular man was requested by a contractor, to send that man to work on that project—a practice, according to Galvin, successor to Lanham, that had been in effect during the eleven years of his connection with Local 100.

After this initial contact with Lanham, Borden returned to his home local at Shreveport, securing his clearance card and returning to Dallas, then seeking to present such card to Lanham. After several attempts, Borden found Lanham [fol. 403] in a cafe across the street from the Union Hall and offered his clearance card. On return to the union office Lanham accepted the clearance card but told Borden "that don't mean you are going to work by any means."

In the meantime, according to A. G. Thurman, foreman of the Bank project, Borden had called him, stating that he was in town, desiring a job and had placed a clearance card with Local 100, Thurman saying "if you get a referral come on down" that he (Thurman) later called Lanham requesting that Borden be referred to the Bank project, to which Lanham replied "I am not about to send that old S-O-B down there. He shoved his card down our throats and I am not about to send him to the Bank."

Borden testified that continually thereafter he had requested employment on the Bank site but was continually denied work going on there from September 15, 1953 to September 15, 1954; and it is not disputed that plaintiff held himself available for work on the bank job during all that time; in the interval, being referred to several other jobs by Lanham; that he had complained to Zuefeldt, business agent of the Union, also to several other members of the discriminatory treatment here alleged; further that in October 1953 at a general membership meeting, his complaint was discussed in the executive minutes of the union which were then read; it being stated at that time and called to attention of the union that Borden was not referred to the Bank site because "he came in here wrong" and would not be allowed to work there. There was further testimony that the executive minutes read at that meeting had been subpoened but reported lost while in possession of Zuefeldt, the business agent. There was testimony of Borden's continued complaint concerning this discriminatory treatment, further evidenced by conversation with Galvin, the successor business manager, who after hearing Borden's story, did nothing about the existing situation; [fol. 404] that thereafter in October 1954 an executive meeting of Local Union 100 was held to consider plaintiff's charges; that at such meeting the Executive Board had maligned Borden, telling him to quit complaining about the treatment he had received from the union, if not, they would expel him from the union and kick him out of Dallas; that the best thing he could do would be to "get out of Dallas". As a result of his appearance before the Executive Committee, Borden said that he was thereafter in fear of bodily harm at the hands of said Union.

It is rather difficult to follow appellants' argument that "Lanham had no duty to refer Borden to the job site requested" in view of its established policy, that once a request is made by an employer for a specific employee, that person is immediately referred to the job site. That this was the uniform practice is explicit in the testimony of foreman Thurman; he stating that in obtaining employees he would place calls with Local 100 which is "the end of my obligation in getting a man on the job"; further testifying that all employees hired by him came through the union office; answering "No, Sir" to the question "Have you ever hired anyone on the job except through Union referral, as is the custom here"; and the record as hereinabove narrated, in our opinion constituted sufficient proof that respondent was wilfully denied a job opportunity to which Lanham knew he was entitled to under the rules and procedures established by petitioners for allocating work among their members. Supreme Court 328 SW 2d 739.

With respect to point three, the referral of plaintiff to the Bank site for work at request of Thurman was in accordance with above union custom, refused by Lanham, with resulting injury to plaintiff. A direct solicitation of the job by him would have been in violation of union rules, [fol. 405] Art. 1, § 30, providing: "Members shall not solicit work from any contractor or their representative. All employment must be procured through business office of Local Union 100. Violations of this Section subject to assessment of not less than Five Dollars ($5.00). * * * ."

Appellant argues the lack of evidence of any responsibility on part of the union for the acts of Lanham, the jury having found that with full knowledge of the conduct of Lanham, "the officers and membership of defendant Local 100 approved such conduct" (Issue 8). We think that record testimony already stated raised the issue. Zuefeldt, the business agent, also Galvin, successor to Lanham, testified to Borden's complaint of discrimination. B. C. Hall, had testified to attendance upon a business meeting of the union in October 1953 (the minutes of which were later lost) at which time Borden's case was discussed, it being stated that he "came in wrong and that plaintiff

was not going to get the requested job because they (the union) weren't going to refer him to the job." Although no action was there taken by the membership, such inaction under the facts of this record must be held tantamount to approval of the prior conduct of Lanham and a consequent ratification. Concerning silence or inaction as ratification, see Cameron v. Gibson, 278 SW 522 where the court quotes from 2 C.J. p. 504, 505 as follows: "Mere silence or delay on the part of a principal in repudiating the unauthorized act of an agent does not necessarily amount to a ratification, but while it is not necessarily conclusive evidence of a ratification, unless it cannot be explained on any other theory, it is always an element to be considered in connection with other evidence tending to show a ratification, and may alone be sufficient to justify a finding of ratification, particularly where the circumstances impose a special duty upon the principal to speak, as where the other party is liable to be misled or injured [fol. 406] by his failure to do so." See also 2 C.J.S. § 57, p. 1126.

Excerpts of admitted testimony is quoted by appellant which is complained of as "inflammatory, irrelevant and incompetent." Such evidence relates principally to a prior practice of the local to refuse clearance cards to outside workmen; bearing, according to appellee, on knowledge by defendant of the discriminatory acts of Lanham. As such, they may be deemed relevant. Nor are the conversations had with Thurman, same being inclusive of the job offer to Borden excludable as hearsay. Thurman, the job foreman, was a member of said local, all members of which were adverse parties to plaintiff. In this connection, appellant says that the jury finding under issue one of the promise to plaintiff by Thurman, authorized foreman of the Farwell Construction Company, was contrary to the great weight and preponderance of the evidence; and the testimony of Northington, general superintendent, is cited that "if anybody was hired I looked for one thing, that it was either Mr. Heath (plumbers) or Mr. George (steamfitters)." Here, while facts of the alleged agency may not be shown by declarations of the agent alone, such constitutes original evidence, and not objectionable as hear-

say. Cook v. Hammer, (Sup.) 309 SW 2d 54. Thurman, plumber foreman, testified that workers on the Republic Bank job were hired by him, he calling Local 100 office and asking for men as needed, the union manager issuing a referral to the job site. Concerning authority to hire his own men, Thurman testified, to a conversation with Heath, plumbing superintendent, (now dead) as follows: "Q. Did you know Jack Heath? A. Yes, sir, very well. Q. What job did he have on that? A. He was general superintendent. Q. He did the hiring on the job, did he not. A. Not necessarily, he hired the foremans or set men up as foremans, but the foremans hired their own men as [fol. 407] they sought fit." The testimony of Northington, general superintendent of Farwell, was in nowise contradictory to the above; his answers on cross-examination going no further than that he looked to George and Heath for satisfactory results. And issue one is not objectionable as multifarious and duplicitious. The fact of a job offer by Thurman to Borden is not disputed, the authority of the former to make such an offer being only at issue. Appellant could not have been injured by this combination of a disputed issue with the undisputed one. Goodrich v. First National Bank, writ ref., 70 SW 2d 609.

The jury found that though Borden failed to exhaust the remedies available to him through union channels, also that pursuit of remedies, rules and procedures of the union would have been useless. Appellant asserts that plaintiff's claim is barred because of such failure, but the point is overruled. The Constitution and By-Laws of both parent association and defendant Local deal strictly with assessments, suspensions and expulsion, no where providing for a procedure whereby an allegedly wronged member may make claim for back wages or damages for discriminatory practices as in the instant situation and the testimony was clear that any application of union sanctions would have resulted only in the punishment of Lanham. Clearly, therefore, the pursuit of any remedies against the union by Borden would have been ineffectual, illusory and futile as well. In Anderson, et al. v. Painters' Local Union No. 318, 338 SW 2d 148 is stated the general rule as set forth in 168 ALR, pages 1472-1473 that:

"• • • it is pretty generally held that where exhaustion of remedies within the Union would amount to a practical denial of justice to the expelled or suspended member, *or would be illusory or vain*, it will not be insisted upon, par- [fol. 408] ticularly where property rights of the member are involved, as a condition to the right to invoke the aid of a court of equity for reinstatement to and restoration of membership." (emphasis ours).

Appellant contends that the suit should be barred by laches or estoppel. The material facts relative to this point have heretofore been sufficiently detailed. The action was brought approximately a year after it became clear to plaintiff that he could proceed no further within the frame work of the union (except for the vain and illusory appeal just discussed) and no laches is shown, defined in 27 Tex. Jur. p. 16, as "inexcusable delay in asserting an equitable claim." Nor is equitable estoppel involved; an element of which is "the effect of the *voluntary* conduct of a party whereby he is absolutely precluded, both in law and in equity, from asserting the right that might perhaps otherwise have existed • • • ." (emphasis ours). (22 Tex. Jur. 2d p. 664). Under the restrictive provisions of defendant Local's By-Laws and Constitution, plaintiff had no alternative other than to work at other job sites on referrals by the union. Through economic compulsion plaintiff was required to accept these referrals and his action cannot be said to be voluntary within meaning of this equitable doctrine. There was no detrimental reliance thereon, or change of position by the union; and appellee though referred to other jobs did not abandon his quest for employment on the Bank site.

Appellant charges an absolute lack of evidence on which to base any punitive damages or of knowledge by the membership of the wilful nature of Lanham's conduct. The latter phase of such point has already been touched upon; as also the sufficiency of evidence in support of the jury's answer (Issue 8) that "the officers and members of said defendant Local Union approved such conduct." The term "wilfully" was properly defined and it is well settled that when the conduct is shown to be wilful, punitive damages are recoverable. Briggs v. Rodriguez, 236 SW 2d 510.

[fol. 409] Lastly appellant says that the jury answers to issues 5 and 7 are contradictory and irreconcilable, and that because of such conflict a mistrial should have been declared. The jury answered "yes" to Issue 5 reading: "Do you find from a preponderance of the evidence that the said defendant Local Union 100, acting by and through Cleo Lanham, wilfully refused to let the plaintiff work on said Republic National Bank Building?" Issue 7, to which the jury answered "No" reads: "Do you find from a preponderance of the evidence that such refusal to let the plaintiff work on said Republic National Bank Building, if you have so found, was without any cause or reason whatsoever?" During its consideration of the latter issue the jury questioned the trial Judge as follows: "Does 'without any cause or reason' mean without any reason whatsoever (personal or otherwise) or does it mean without reason according to the union by-laws?" to which the court replied: "In answer to such communication you are instructed that: 'It means a cause or reason' which was actuated by an intent that was not in good faith. A denial, even though erroneous, which resulted merely from negligence, inadvertence or mistake would not be without any cause or reason whatsoever."

In due course appellee made motion to disregard the jury's answer to issue 7 as not ultimate or controlling and for judgment on the remaining answers which the court granted and so found in final judgment.

Appellant now argues that "Findings 5 and 7, considered separately and taken as true, would compel different judgments. The Supreme Court, in its earlier decision in this matter, stated that the union was not liable if Lanham's action, although wrongful, resulted from negligence, inadvertence or mistake. By Special Issue No. 7 the jury so found, and it follows that the union is not liable. [fol. 410] On the other hand, the Supreme Court stated that if Lanham wilfully denied Borden a job opportunity, and other named conditions were present as well, the union was liable." We do not pause to interpret the effect of jury answer to Issue No. 7 aided (if it was) by the Court's extraneous instruction thereon in answer to their inquiry.

In the first place, Issue 7 was eliminated by the court in final judgment, its rendition being for plaintiff on the remaining jury findings. There could be no basis therefore for claim of irreconcilable conflict of issues; and while appellant took exception to the court's action in so disregarding issue No. 7 and answer, same was not brought forward in any point on appeal. Furthermore, the issue was evidentiary at best. In deciding whether these findings are in direct and irreconcilable conflict, the entire charge and all of the verdict must be considered. 41 Tex. Jur. Trial p. 794, and we must not presume that the jury intended to render conflicting answers. Swift & Co. v. Phillips, 314 SW 2d 326. In Issue No. 5 the jury had already found that the conduct of Cleo Lanham was wilful; the term meaning, under the court's charge, "the intentional and purposeful disregard of the known rights of another". And any "cause or reason" for Lanham's refusal to refer plaintiff to the job site is explicit in the testimony of the latter, also Thurman's, already sufficiently detailed. The point is accordingly overruled.

Appellee's crosspoint No. 1 the jury had made an award to plaintiff of $5,000 as punitive damages which the trial court found to be "unjust and excessive under the facts and that the plaintiff should be required to remit to the extent of such punitive damages not to exceed the actual damages awarded * * * ". By subtraction, (Issues 9 & 10) the [fol. 411] punitive damages awarded was reduced to $1,916. Appellee in turn asserts error in this requirement of remittitur of $3,084; pointing out that the jury verdict is not excessive under the test laid down in 13 Tex. Jur. p. 396, and followed by the adjudicated cases. However, in the recent case of Flanigan v. Carswell, 324 SW 2d 835 our Supreme Court held that a Court of Civil Appeals in passing upon a trial court's action in ordering a remittitur must determine propriety of the order by deciding whether such trial court has abused its discretion.

In the light of all the facts and circumstances of this case, we cannot say that the action of Judge Stout in this connection was manifestly unjust and hence overrule the crosspoint.

All points of appeal are accordingly overruled and judgment of the trial court is in all respects affirmed.

Young, Associate Justice.

Delivered: February 9, 1962.

Footnote:

The same jurisdictional plea had been previously raised on appeal to this Court (316 SW 2d 458) and overruled but not interposed on writ of error to the Supreme Court of Texas. See 328 SW 2d 739.

[fol. 412]

IN THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES, et al.,

vs.

H. N. BORDEN.

From District Court of Dallas County

JUDGMENT—FEBRUARY 9, 1962

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be, in all things, affirmed; that the appellee, H. N. Borden, have and recover of the appellant, Local 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and of National Surety Corporation, its surety upon supersedeas appeal bond, the amount adjudged below, together with all costs

in this behalf incurred or expended for which execution may issue; and that this decision be certified below for observance.

[fol. 413]

IN THE SUPREME COURT OF TEXAS

From Dallas County, Fifth District.

July 25, 1962.

No. A-8993.

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES, et al.,

vs.

H. N. BORDEN,

ORDER OVERRULING PETITION FOR WRIT OF ERROR—July 25, 1962

Application of petitioner for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicant, Local 100 of the United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada, and its surety, National Surety Corporation, pay all costs incurred on this application.

I, Geo. H. Templin, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment or order of the Supreme Court of Texas on application for writ of error in the case of Local 100 of The United Association of Journeymen & Apprentices et al. vs. H. N. Borden, No. A-8993, from Dallas County, Fifth District, as such judgment or order appears of record in the minutes of said Court under date of July 25, 1962.

In Testimony Whereof, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 1st day of October, A. D. 1962.

Geo. H. Templin, Clerk, By Carl B. Lyda, deputy.

(Seal)

[fol. 414]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 17, 1962.

The petition herein for a writ of certiorari to the Court of Civil Appeals of the State of Texas, Fifth Supreme Judicial District, is granted. The case is placed on the summary calendar and set for argument immediately following No. 482.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

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In the

Supreme Court of the United States

OCTOBER TERM, 1952

No. 541

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES,

Petitioner,

v.

H. N. BORDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No.

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES,

Petitioner,

v.

H. N. BORDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

Local 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada respectfully prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, entered in this cause on February 9, 1962.

OPINIONS BELOW

The opinion rendered by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas on February 9, 1962 affirming damage judgment against Petitioner is reported at 355 S. W. 2d 729, and is printed in Appendix A at pages 1a

to 18a. On July 25, 1962 the Supreme Court of Texas denied writ of error without opinion.[1]

JURISDICTION

The judgment of the Court of Civil Appeals for the Fifth Judicial District of Texas was entered on February 9, 1962.

The Supreme Court of Texas refused timely application for Writ of Error on July 25, 1962, making final the decision of the Court of Civil Appeals (App. B, p. 1b).

The jurisdiction of this Court is invoked under *28 USC 1257 (3)*, in that the Courts of Texas have upheld a damage award against a union based upon a controversy that is subject to the exclusive jurisdiction of the federal regulatory agency created by the Labor Management Relations Act of 1947.

QUESTION PRESENTED

Does a state court have jurisdiction to award compensatory and punitive damages against a labor union for its refusal to issue a job referral to a member, which refusal resulted in denial of employment by an employer whose operations affect interstate commerce? Is such conduct by a labor

[1] Earlier opinions of the Texas appellate courts in the case, reviewing the trial court's original dismissal of the suit on the ground, among others, of federal pre-emption are also appended, viz:

Unreported opinion of the Dallas Court of Civil Appeals rendered April 11, 1958, sustaining defendants federal pre-emption plea, Appendix A, p. 57a, *infra*.

Opinion of the Dallas Court of Civil Appeals rendered July 25, 1958, reported at *316 S. W. 2d 458*, withdrawing its opinion of April 11, 1958, and remanding for trial on the merits, Appendix A, p. 51a, *infra*.

Opinion of the Supreme Court of Texas, *160 Tex. 203, 328 S. W. 2d 739*, rendered November 4, 1959, affirming remand for trial on the merits, Appendix A, p. 19a, *infra*.

union "potentially subject to the exclusive federal regulatory scheme" expressed in the Labor Management Relations Act of 1947, and thus limited to the exclusive jurisdiction of federal tribunals under the federal Act?

CONSTITUTION—STATUTES INVOLVED

The Constitutional provision involved is the Supremacy Clause, Art. VI, Clause 2, reprinted in Appendix E, p. 1e.

The statutory provisions involved are Sections 2(2), (3), (7), 8(a)(3), 8(b)(1)(A), 8(b)(2), and 10(a) of the Labor Management Relations Act of 1947, *61 Stat. 136 et seq.; 29 U.S.C., §152(2), (3), and (7); §158 (a)(3), (b)(1)(A), (b)(2); 160(a)*. Reprinted in Appendix E, pp. 1e to 5e.

STATEMENT OF THE CASE

The Texas state courts have denied pleas of federal preemption and assumed jurisdiction to award actual and punitive damages[2] to H. N. Borden, against the labor union of which he is a member, based on a refusal to "refer" Borden to a job on a construction project which affected interstate commerce.

Plaintiff Borden's petition asserted (Tr. 6)[3]; (1) that the union had denied him rights of membership by refusing to "clear" him into the Dallas local union, and (2) that union thereafter denied him employment by refusal to issue a "referral" necessary to obtain employment with Farwell

[2]The jury found $1,960 actual damages; $1,500 mental anguish; plus $5,000 punitive damages (Tr. 36, 37, 38) (Damage issue submission, Appendix C, pp. 7c-10c). The trial judge excised the mental anguish award, and reduced the punitive to equal the actual damages found. Thus judgment was entered for $3,832.00 plus interest.

[3]Tr. refers to "transcript" the compilation of pleadings and orders in the trial court.

Construction Co., which employment Farwell's foreman had offered to him, subject to obtaining union referral (Tr. 6, 5).

The jury found (Tr. 34) that union had *not* refused to clear Borden into the local. There is thus no question in the case as to the acquisition or retention of union membership rights.

Judgment against the union for actual and punitive damages was based on jury findings that Borden was promised a job by the authorized foreman of Farwell (Tr. 33, App. C, p. 4c); that Farwell placed a call with the union for Borden to be issued a referral to work for Farwell (Tr. 34, App. C, p. 5c); that the union agent, Lanham, refused to issue a referral to permit Borden to work for Farwell (Tr. 34-35, App. C, p. 6c); and that the union ratified Lanham's conduct (Tr. 35; App. C, p. 7c).[4]

The Farwell employment clearly affected interstate commerce. It is stipulated (S. F. 315) that in construction of the Republic Bank, at which Borden sought employment, employer Farwell purchased materials having a value of over half a million dollars, which materials were manufactured in states other than Texas and transported in interstate commerce from points outside the State of Texas to the Republic Bank job site in Dallas, Texas, where they were installed by Farwell employees (S. F. 317).[5]

[4] No finding was made as to the cause of the refusal to refer by the jury or by either the trial or appellate courts.

[5] NLRB asserts jurisdiction over any industry which has an annual inflow across State lines of at least fifty thousand dollars. *In re Man Products, 128 NLRB 546.*

S. F. refers to "Statement of Facts" the stenographic Record of the trial.

HOW FEDERAL QUESTION IS PRESENTED

The union challenged the state court's jurisdiction by appropriate plea to the jurisdiction (App. D, p. 1d, *infra*) and the trial court initially dismissed the suit, holding, *inter alia*, that "jurisdiction of a suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the exclusive jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, and accordingly this court is without jurisdiction." (App. A, p. 37a).

The Texas Court of Civil Appeals affirmed in an unreported opinion rendered April 11, 1958 and reproduced *infra* at App. A, p. 57a.

Before this opinion became final, and while the cause was pending on rehearing in the Court of Civil Appeals, the Supreme Court of the United States on May 26, 1958, decided *International Ass'n of Machinists v. Gonzales, 356 U. S. 617.*

The Texas Court of Civil Appeals thereupon withdrew its earlier opinion, and on July 25, 1958, substituted an opinion reported at *316 S. W. 2d 458* (App. A, p. 51a, *infra*), citing *Gonzales*, and holding "that the State Court has jurisdiction of appellant's suit." *316 S. W. 2d 461*,* and remanded for trial on the merits.

*The Supreme Court of Texas granted writ of error on another point, and in an opinion (which does not treat of the jurisdictional issue) affirmed the Court of Civil Appeals and remanded the case for jury trial. See *328 S. W. 2d 739*, opinion of November 4, 1959, reproduced at Appendix A, p. 19a, *infra*.

On remand the jurisdictional pre-emption point was again presented by plea to the jurisdiction in amended answer of Local 100 (Tr. 22-23, App. D, p. 2d) and by motion for new trial (Tr. 141, App. D, p. 2d), and overruled in both instances.

On appeal from final judgment after jury trial, the union's first point of error was "The Court did not have jurisdiction of the instant lawsuit."[1] The Texas Court of Civil Appeals addressed itself to the federal pre-emption issue and, again relying on *Gonzales*, expressly overruled the challenge to state jurisdiction by holding the federal law does not pre-empt—that the federal law is inapplicable in that (a) Borden was not an "employee" within the meaning of the federal law, since he was merely an applicant for employment, and (b) that the discrimination was not of the type proscribed by federal law since Borden was already a member of the union. Specifically, the Court stated, in overruling the federal pre-emption point: "By plain wording of the [Federal] Act, the discrimination must be limited to purpose of encouragement or discouragement of membership in the union and plaintiff was already a member." *355 S. W. 2d 729 at 733*, App. A, p. 5a, *infra*. The Court held as to the jurisdictional pre-emption claim: "Appellant again asserts exclusive application of 29 U.S.C.A. § 151, et seq. (Taft-Hartley) to this lawsuit. * * * The point is again overruled." *355 S. W. 2d at 732, 733.*

Application for writ of error to the Supreme Court of Texas asserted as point of error number one: "The Court of

[1] Appellant's Brief to the Court of Civil Appeals, p. 7.

Civil Appeals erred in holding that the State Courts have jurisdiction of the instant lawsuit."[8] The Supreme Court of Texas denied writ of error without opinion.

REASONS FOR GRANTING THE WRIT

A.

The Importance of the Question

Specification of the boundaries between state and federal jurisdiction over labor relations matters within the orbit of federal legislation is of such importance as to have long occupied this court.[9] Guidelines have been marked with respect to competence to control picketing, other forms of employee concerted activity, and union-employer controversies by the opinions of this Court cited in note 9.[10]

But jurisdiction as to equally important and frequently recurring controversies between unions and their members

[8]Petitioner's Application for Writ of Error, 1962, pp. 7 ff.

[9]*Marine Engineers Ass'n v. Interlake Steamship Co.,* U. S. , 8 L. Ed. 2d 418 (June 11, 1962); San Diego Bldg. Trades v. Garmon, 359 U. S. 236; Youngdahl v. Rainfair, 355 U. S. 131; Cavett v. Machinists, Lodge 34, 355 U. S. 39; Farnsworth & Chambers Co. v. Electrical Workers, 353 U. S. 969; Teamsters Local Union v. Kerrigan Iron Works, 353 U. S. 968; Garmon v. San Diego Bldg. Trades, 353 U. S. 26; Guss v. Utah Labor Relations Board, 353 U. S. 1; Newberry Co. v. Retail Clerks, Local 560, 352 U. S. 987; Elle Construction Co. v. Pocatello Bldg. Trades Council, 352 U. S. 884; Teamsters Local Union 25 v. New York, N.H. & H.R. Co., 350 U. S. 155; Weber v. Anheuser Busch, Inc., 348 U. S. 468; United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656; Kinard Construction Co. v. Building Trades Council, 346 U. S. 933; Garner v. Teamsters, 346 U. S. 485; Amalgamated Ass'n S.E.R. M.C.E. v. Wisconsin Employment Relations Board, 340 U. S. 416; International Union Auto Workers v. O'Brien, 339 U. S. 454; Hill v. Florida, 325 U. S. 538.

[10]Texas has been reluctant to follow these guides. See *Ex Parte George, Tex. , 358 S. W. 2d 590,* where Texas Courts assert jurisdiction to jail a union member for engaging in picketing activity either protected or prohibited by the Federal Act. We understand that application for certiorari is presently pending in that case.

has not been so clearly marked. The extent to which the federal legislation has excluded the exercise of state power in granting relief to a union member for damage resulting from union discrimination has been determined only once by this court. In *International Association of Machinists v. Gonzales, 356 U. S. 617 (1958)* a divided Court upheld state competence "to determine and enforce the rights of union membership." *356 U. S. at 620.* The *Gonzales* opinion recognized "The Delphic nature" of "the statutory implications concerning what has been taken from the states and what has been left to them" and left to the future "process of litigating elucidation" the drawing of more specific boundaries. *356 U. S. at 619.*

The light from such litigation (which has been profuse in the state courts since *Gonzales)* leaves much in shadow, and, depending upon which state beacon is the source of the illumination, results in conflict and confusion.

Thus, in the instant case, pre-*Gonzales*, the Texas state courts held the matter pre-empted. But in the latest post-*Gonzales* opinion (App. A, p. 1a, *infra*) the Texas Court narrowly, and erroneously, construes the federal statute and affirms state jurisdiction by misapplying *Gonzales*, although neither the issues nor the facts are apposite.[11]

[11] As we detail, *infra*, p. 14 ff., the instant case involves only discrimination in employment, fully covered by the federal statutory scheme. While plaintiff's petition also claimed rights "with respect to the acquisition or retention of membership therein" (the right vindicated by the state in *Gonzales*), that aspect went out of the case with the jury's finding #3 (Tr. 34) that Borden had not been denied clearance into the local. All that was left was the claim of discrimination as to employment which was fully covered by the federal Act. See *Radio Officers Union v. NLRB, 347 U. S. 17, 33, 42 (1954); NLRB v. Local 1423, etc., 238 F. 2d 832 (C.A. 5, 1956); Plumbers, etc. Local 100, et al. v. Breland, 128 NLRB 398 (1960); enforced, 291 F. 2d 927 (C.A. 5, 1961).*

Texas is not alone in its misapplication of *Gonzales*. Arizona, Idaho, Kansas, California, Ohio and North Caroline have construed *Gonzales* as giving license to the states to entertain virtually any damage suit by a member against his union. While courts in Pennsylvania, New Jersey and New York have concluded that the federal remedy is exclusive.

We briefly note a sample of the post-*Gonzales* conflicting state cases. The following uphold state jurisdiction:

In *Sheetmetal Workers v. Nichols, 89 Ariz 187, 360 P. 2d 204 (1961)*, the Arizona Supreme Court considered *Gonzales* to stand for the proposition that states enjoyed "concurrent jurisdiction" with the NLRB over matters admittedly constituting unfair labor practices under §8(b) (2) and 8(a) (3) of LMRA.

In *Lockridge v. Motor Coach Employees, 369 P. 2d 1006, I.D.A. (1962)*, the Idaho Supreme Court concluded that *Gonzales* permitted the state court to maintain an employee's suit for compensatory damage based upon an allegation of discharge at union request under a union shop provision, following suspension from the union for dues arrearage.

The Kansas Supreme Court recently overruled a preemption plea where plaintiff alleged, as a consequence of conspiracy between union and employee, he was deprived of employment because of lack of union membership. *Taylor v. Hoisting Engineers, Local 101, 189 Kan. 137, 368, P. 2d 8 (1962).*

Similar aberrations regarding the meaning of the *Gonzales* case appear in *Allen v. Los Angeles County Carpenters, 51 Cal. 2d 811, 337 P. 2d 457 (Cal. S. Ct. 1959)*, (individual suit against employer and union in which the court below found the action pre-empted as to the employer, but sustained jurisdiction with respect to the union); *Perko v. Local 207, Ironworkers, 168 Ohio St. 161, 151 N. E. 2d 742 (Ohio S. Ct. 1958)*, (sustains state jurisdiction in *tort* action which court recognizes could constitute an unfair labor practice); *Willard v. Huffman, 250 N. C. 396, 109 S. E. 2d 233 (N. C. S. Ct. 1959), cert. denied 361 U. S. 893.* (Apparently, the employer's operations fell in the then existing "no man's land" between NLRB and state jurisdiction).[12]

Other states hold similar suits pre-empted, viz:

The Supreme Court of Pennsylvania recently found pre-empted an ex-member's suit against his union for reinstatement and loss of earnings resulting from expulsion. In so doing the court concluded that "the rationale underlying the *Gonzales* decision has been almost entirely obliterated by the subsequent holding in the second *Garmon* case." *Wax v. International Mailers Union, 400 Pa. 173, 161 A. 2d 603 (1960).*

A New Jersey Court declined jurisdiction over a suit by employees and their union alleging breach of contract by their employer and malicious interference with the contract by another union, concluding that the conduct

[12]The Congress has since eliminated the "no man's land" by §701 of the Labor Management Reporting and Disclosure Act of 1959. Public Law 86-257, 86th Cong. S 1555, Sept. 14, 1959, 73 Stat. 541; 29 U.S.C. §164.

arguably constituted an unfair labor practice. *Hod Carriers Local 502 v. Park Arlington Corp., 73 NJS 433, 180 A. 2d 181 (1962).* A New York Appellate Court declined jurisdiction on facts quite similar to those before the Idaho Supreme Court in *Lockridge v. Motor Coach Employees, 369 P. 2d 1006, supra, p. 9,* i.e. alleged invalid expulsion from union membership causing loss of employment under union shop agreement. *Green v. Folks, 13 App. Div. 2d 744, 215 N.Y.S. 2d 116 (1961).*

Thus the "process of litigating elucidation" concerning the boundaries between state and federal powers in suits by union members against unions is producing the very regional variations which the federal regulatory scheme was designed to eliminate.

B.

The Texas Decision Is Not in Accord With Applicable Decisions of This Court

(1) *State intrusion in matters this Court has traditionally recognized subject to Federal control.*

The Texas Courts deal with a union's "discriminatory course of conduct * * * consisting of the refusal of the union to * * * refer him (Borden) to a job offered him in the construction of the Republic National Bank Building" *(335 S. W. 2d 729 at 731;* App. A, p. 1a, *infra)* by awarding actual and punitive damages to the member subject to such discrimination.

Federal tribunals, applying the *federal* statute, deal with the identical "discriminatory course of conduct" by requiring offer of employment and back pay. Myriad decisions of the NLRB and the federal courts apply section 8(b)(2) of the Federal Act to unions which deny "referral" to their members. *Radio Officers Union v. NLRB*, 347 U. S. 17 (Fowler's case) finds on facts similar to those at bar a violation of the Federal Act, viz:

> "• • • refusal of clearance caused the company to discriminate against Fowler [then a member of the union] in regard to hire. Without the necessary clearance it could not accept him as an employee. The result was to encourage membership in the union." *347 U. S. at 33.*

The very local union, here petitioning for certiorari, was held by the NLRB to have violated Section 8(b)(2) of L.M.R.A. with respect to one Breland who "was unable to start working because his employment had been conditioned upon his obtaining a work order or clearance from the Respondent Union and that he had been unable to secure the necessary order" 128 NLRB 398 at 399 (1960). The NLRB order requiring this union to make Breland whole for loss of pay resulting from refusal to grant him a referral was enforced by the Court of Appeals. *NLRB v. Local 100, Plumbers, 291 F. 2d 927 (C.A. 5, 1961).*

Union "hiring hall" or "referral" procedures are almost daily being tested under the Federal Act by the NLRB. A large body of federal law with respect to these practices is already in the books. Most recently this Court met the problem of applying the federal law to such union activities

in the *Mountain Pacific* case.[13] The NLRB, the federal Courts of Appeals and this Court have built a large body of federal case law by which allegations of discrimination in operation of referral systems are to be and are being tested.[14]

For Texas tribunals to assert jurisdiction and to apply Texas law to similar claims is directly contrary to the holding of this Court in the second *Garmon* case, *San Diego Bldg. Trades, etc. v. Garmon, 359 U. S. 236*, viz.:

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard of the Federal enactment requires that state jurisdiction must yield."

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[13] *Local 357, Teamsters v. NLRB, 365 U. S. 667.*

[14] *NLRB v. Local 340, Electrical Workers, 301 F. 2d 824 (C.A. 9—1962); NLRB v. Local 392, Plumbers, 277 F. 2d 56 (C.A. 7—1960); NLRB v. Local 542, Operating Engineers, 255 F. 2d 703 (C.A. 3—1958); NLRB v. Local 1423, Carpenters, 238 F. 2d 832 (C.A. 5—1956); NLRB v. Philadelphia Iron Works, 211 F. 2d 937 (C.A. 3—1953); c/f NLRB v. Local 419, Painters, 242 F. 2d 477 (C.A. 10—1957); NLRB v. Local 420, Plumbers, 239 F. 2d 327 (C.A. 3—1956); NLRB v. Jarka Corp., 198 F. 2d 618 (C.A. 3—1952).*

Without attempting to detail the numerous NLRB decisions testing the legality of union referral procedures and hiring hall practices, the frequency of the occurrence of the question can be demonstrated by a statement contained in a recent Annual Report of the NLRB.

> "As in prior years, a substantial number of the cases against unions arose from complaints alleging contractual or informal arrangements under which the participating employer was to give preferential treatment to the union's members, or the union was to have control over such matters as hiring and seniority. The maintenance of agreements which in effect condition employment or employment benefits on union membership and compliance with union rules—other than as permitted by the act's union-security provisions—has consistently been held violative of the nondiscrimination provisions of section 8(b)(2) and 8(a)(3) in that such arrangements inevitably encourage union membership * * *."

Twenty-Fifth Annual Report of the National Labor Relations Board—at p. 90 (1961); c/f Twenty-Sixth Annual Report of the National Labor Relations Board at p. 121 (1962).

This limitation obtains "regardless of the mode adopted" by the states to express or enforce the state policy.

(2) *Misconstruction and Misapplication of Decisions of This Court.*

This record is not a repetition of *Gonzales*, wherein the Court permitted state control of a claim for restoration of union membership.

Borden was not denied membership. His pleadings so asserted (Tr. 7), but the jury found he had not been denied clearance into the union. The acceptance of his clearance card made him in all respects a member of Local 100.[15] His complaint, then, and the judgment which we assert to be erroneous, dealt only with the union's blocking his employment.

Both the majority and the dissent in *Gonzales* recognize that such complaints are for exclusive federal determination. For as the majority noted: "The [Gonzales] suit did *not* purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the [federal] Board is concerned to strike at as an unfair labor practice under §8(b)(2)," *356 U.S. at 622*; and "the state court proceedings [in Gonzales] deal with arbitrariness and misconduct vis-a-vis the individual union member and the union; the *Board* proceedings, looking principally to the *nexus between union action and employer discrimination* * * *" *356 U. S. at 622, 623* (Emphasis added).

[15] See Jury finding #3 (App. C, p. 5c, Tr. 34); and Opinion of Texas Court of Civil Appeals, *355 S. W. 2d at 732*, App. A, pp. 5a, 7a, *infra*.

This is the sole nexus upon which Borden's state court recovery is predicated: union refusal to refer, causing employer refusal to hire, i.e. discrimination in violation of 8(b)(2) and 8(a)(3) of the federal Act. Clearly, then, the Texas courts have misconstrued and misapplied *Gonzales*.

Texas' attempt to retain jurisdiction by interpreting the federal Act so narrowly as to exclude from federal protection applicants for employment (as distinguished from "employees"), is in direct conflict with *Phelps-Dodge Corp. v. NLRB, 313 U. S. 177*, where this Court held applicants for employment to be "employees" within the protection of the federal statute.

Similarly, the narrowing of the federal statute to protect against discrimination only those who are not union members, viz.: "By plain wording of the (federal) Act the discrimination must be limited to purpose of encouragement or discouragement of membership in the union *and plaintiff was already a member*," *355 S. W. 2d at 733*; App. A, p. 5a, *infra* (emphasis added)—runs counter to this Court's application of the federal Act to protect union members (as well as non-members) in *Radio Officers Union v. NLRB, 347 U. S. at 33*.

Finally, the Texas Court's remedy (private damages, both actual and punitive), serves to demonstrate the evil inherent in state action in areas pre-empted to federal control. For the state court did not—and could not—require the union to purge its §8(b)(2) violation, to post remedial notices, and to "cease and desist" from activities which the federal law holds inimicable to the public interest. Thus, Borden's private interest was improperly served, and the public interest served not at all.

CONCLUSION

For the foregoing reasons it is respectfully requested that this petition for writ of certiorari be granted.

Respectfully submitted,

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DATED: October 17, 1962.

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of October 1962, a true and correct copy of the foregoing was served upon counsel for respondent, Messrs. Lyne, Blanchette, Smith & Shelton, Adolphus Tower Building, Dallas, Texas, by personally delivering same to their offices.

L. N. D. WELLS, JR.

APPENDIX A

Opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas
Delivered February 9, 1962

No. 15,930

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, ET AL.,
Appellants,

v.

H. N. BORDEN,
Appellee.

From a District Court of Dallas County.

This is a damage suit brought by Borden, appellee, against two unincorporated labor unions—appellant Local 100 and the parent body of similar name. Borden sought money damages both actual and punitive, for loss of earnings and mental anguish, arising out of allegedly wilful, malicious and discriminatory course of conduct of the two unions; same consisting of the refusal of the unions to treat appellee as any other union member and to refer him to a job offered him in the construction of the Republic National Bank Building. His suit is based on allegations involving both tort and contract.

This suit had been previously dismissed by the trial court on plea in abatement, and on appeal to this Court was reversed and remanded to the trial court for trial to the merits. On writ of error granted by our Supreme Court, the opinion of reversal was affirmed; it holding that a cause of action would lie if plaintiff "was wilfully denied a job opportunity to which Lanham, the Local Union Business Manager, knew he was entitled under the rules and procedures established by petitioners for allocating work among their members, and that petitioners either conspired with Lanham to bring this about or otherwise authorized or ratified his wrongful conduct * * * *." United Association of Journeymen, et al. v. Borden, Tex. Sup. Ct., 328 SW 2d 739; see also 316 SW 2d 458 for further background of case and conclusions of this Court.

The facts material to appellee's claim of injury are generally outlined in the following summary of the numbered jury issues and answers: (1) that on or about Sept. 16, 1953 plaintiff Borden was promised a job on the Republic National Bank Building by the authorized foreman of the Farwell Construction Company; (2) that at a time when plaintiff was available for work, a call was placed by A. G. Turman calling for plaintiff to go to work upon said Republic Bank Building; (3) that defendant Local Union 100 by and through its business manager Cleo Lanham, thereafter did not refuse to accept plaintiff's clearance card from his local union in Shreveport, Louisiana; (5) that said defend-

ant Local Union 100 wrongfully refused to let plaintiff work on said Republic Bank Building; (6) that such refusal was made at a time when said Cleo Lanham knew that under the rules of said local union plaintiff was entitled to work on said bank building; (7) that such refusal to let the plaintiff work on said bank building was *not* without any cause or reason whatsoever; (8) that with full knowledge of the conduct of Cleo Lanham concerning plaintiff, the officers and members of defendant Local Union 100 approved such conduct; (9) that had plaintiff been allowed to work on the Republic Bank Building from Sept. 15, 1953 to Sept. 15, 1954 he would have earned $5,856; (10) plaintiff earned, or by use of reasonable diligence, could have earned during same period the amount of $3,940; (11) that plaintiff, by being denied the Republic Bank job opportunity, suffered mental anguish; (12) which was proximately caused by defendants Local Union 100; (13) reasonable compensation for the mental anguish suffered was $1500; (14) that plaintiff should be awarded $5,000 as punitive damages against defendant Local Union 100; (15) that plaintiff, after having been refused the job opportunity to work on the Republic Bank Building, *did fail* to pursue his grievance within the rules and procedures of said Local Union 100 that were available to him; (16) that plaintiff voluntarily accepted other work in October 1953 upon referral from defendant Local 100 without complaint; (17) but that plaintiff *did not* acquiesce in defendant Local 100 actions; (19) plaintiff *did not* fail to apprise defendant Local 100 of his complaints;

(22) that it would have been useless for plaintiff to have pursued his complaint within the rules and procedures of the defendant Local 100.

In this connection the court overruled the motion for summary judgment of Local Union 100 seasonably filed and carried along to close of evidence; also its motion for judgment on the verdict; and in the alternative, its motion for judgment non obstante veredicto. Plaintiff's motion to disregard jury answer to Issue No. 7 and for judgment on remainder of the jury verdict was sustained; holding however that in a suit of this type the issue of mental anguish was not raised and should not have been submitted; also that the amount of punitive damages so found was excessive; and that plaintiff should be required to reduce the punitive damages to an amount not exceeding the actual damages sustained, or a total judgment of $3,832 to which plaintiff duly excepted, defendant Local Union 100 likewise excepting to all of above adverse rulings. A peremptory instruction had been given in favor of the parent union to which plaintiff duly excepted.

Appellant again asserts exclusive application of 29 U.S.C.A. § 151, et seq., (Taft-Hartley Act) to this lawsuit. (Footnote).

In this plea to the jurisdiction it is argued that answer to Issue No. 5—wilful refusal of defendant Local Union 100 through Lanham that the plaintiff work on said Republic Bank Building--constituted an unlawful labor practice within provisions of Section 158 (b), which reads: "It shall be

an unfair labor practice for a labor organization or its agents * * * '(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section * * *.' The material part of subsection (a) (3) of § 158 reads as follows: 'It shall be an unfair labor practice for an employer—' (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:' * * *."

The suit of Borden as already stated was based on both contract and tort. Even if Borden be considered an employee, which appellee denies, Farwell Construction Company, the contractor and employer, was not a party to the suit and there is no evidence that it practiced any discrimination against Borden or treated him anywise different from other employees. He was simply offered a job and requested to obtain a referral from Local Union 100 as were all other employees of Farwell. By plain wording of the Act, the discrimination must be limited to purpose of encouragement or discouragement of membership in the union and plaintiff was already a member. This is a suit for wrongs allegedly committeed against plaintiff by arbitrary conduct of Local Union 100; and as held in International Association of Machinists v. Gonzales, 356 U.S. p. 617, 78 Supreme Ct. 923, the Labor Management Relations Act does not displace state court jurisdiction over suits to determine and enforce rights of union members in their union. In the cited cases it is stated: "But the protection of union members in their rights as members from arbitrary conduct by unions and union

officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to §8 (b) (1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *'." The point is again overruled.

Appellants' further points should now be stated: Of court error; (2) because Lanham had no duty to refer Borden to the job site as requested; (3) because the denial by Lanham of a referral was not the cause for Borden's failure to obtain employment at the Bank site; (4) because the union was not responsible for Lanham's acts; (5) in admitting into evidence inflammatory, irrelevant and incompetent evidence; (6) because the finding of Thurman's authority to hire was contrary to the great weight and preponderance of the evidence; (7) in not barring the plaintiff's recovery because of his failure to exhaust remedies within the union; (8) in not finding that the plaintiff was barred from recovery by laches and/or estoppel; (9) in awarding punitive damages; (10) in not setting aside the verdict and declaring a mistrial because the jury's answer to Special Issue No. 5 contradicted and conflicted with the jury's answer to Special Issue No. 7. All of the above points were appropriately countered by appellee.

Local Union 100 is an unincorporated association of some 800 membership in 1954, plaintiff being a member of that union. Members of one Local of the parent association can transfer to any other Local if in good standing. A clearance

card is a devise by which a home local certifies that a member is in good standing. When this card is presented to a local under whose auspices the member seeks to work, the member is in all respects transferred to that Local. A member may also commence work in a certain locality by placing a deposit with the Local Union and later securing his clearance card.

A resume of material evidence bearing on all points and counterpoints (though generally disputed) is presented in the brief of appellee: that in mid-September 1953 Borden arrived in Dallas and called Jack Heath, superintendent of Farwell Construction Company. He had previously worked for this company in Galveston, being there told that he could work for said company on the Republic job site. On coming to Dallas Borden then presented his dues book to Lanham, business manager of Local Union 100; Lanham then telling him that he had come to Dallas "with a job in his pocket" and refused to accept Borden's dues book, further telling him that he would never go to work on the Bank Building and that the best thing for him to do was to get out of town. It was undisputed the uniform practice of Local Union 100 that in case a particular man was requested by a contractor, to send that man to work on that project—a practice, according to Galvin, successor to Lanham, that had been in effect during the eleven years of his connection with Local 100.

After this initial contact with Lanham, Borden returned to his home local at Shreveport, securing his clearance card and returning to Dallas, then seeking to present such card to Lanham. After several attempts, Borden found Lanham in a cafe across the street from the Union Hall and offered his

clearance card. On return to the union office Lanham accepted the clearance card but told Borden "that don't mean you are going to work by any means." In the meantime, according to A. G. Thurman, foreman of the Bank project, Borden had called him, stating that he was in town, desiring a job and had placed a clearance card with Local 100, Thurman saying "if you get a referral come on down" that he (Thurman) later called Lanham requesting that Borden be referred to the Bank project, to which Lanham replied "I am not about to send that old S-O-B down there. He shoved his card down our throats and I am not about to send him to the Bank."

Borden testified that continually thereafter he had requested employment on the Bank site but was continually denied work going on there from September 15, 1953 to September 15, 1954; and it is not disputed that plaintiff held himself available for work on the bank job during all that time; in the interval, being referred to several other jobs by Lanham; that he had complained to Zeufeldt, business agent of the Union, also to several other members of the discriminatory treatment here alleged; further that in October 1953 at a general membership meeting, his complaint was discussed in the executive minutes of the union which were then read; it being stated at that time and called to the attention of the union that Borden was not referred to the Bank site because "he came in here wrong" and would not be allowed to work there. There was further testimony that the executive minutes read at that meeting had been subpoenaed but reported lost while in possession of Zeufeldt, the business

agent. There was testimony of Borden's continued complaint concerning this discriminatory treatment, further evidenced by conversation with Galvin, the successor business manager, who after hearing Borden's story, did nothing about the existing situation; that thereafter in October 1954 an executive meeting of Local Union 100 was held to consider plaintiff's charges; that at such meeting the Executive Board had maligned Borden, telling him to quit complaining about the treatment he had received from the union, if not, they would expel him from the union and kick him out of Dallas; that the best thing he could do would be to "get out of Dallas". As a result of his appearance before the Executive Committee, Borden said that he was thereafter in fear of bodily harm at the hands of said Union.

It is rather difficult to follow appellants' argument that "Lanham had no duty to refer Borden to the job site requestion" in view of its established policy, that once a request is made by an employer for a specific employee, that person is immediately referred to the job site. That this was the uniform practice is explicit in the testimony of foreman Thurman; he stating that in obtaining employees he would place calls with Local 100 which is "the end of my obligation in getting a man on the job"; further testifying that all employees hired by him came through the union office; answering "No, [illegible] the question "Have you ever hired anyone on the job except through Union referral, as is the custom here"; and the record as hereinabove narrated, in our opinion constituted sufficient proof that respondent was wilfully denied a job opportunity to which

Lanham knew he was entitled to under the rules and procedures established by petitioners for allocating work among their members. Supreme Court 328 SW 2d 739.

With respect to point three, the referral of plaintiff to the Bank site for work at request of Thurman was in accordance with above union custom, refused by Lanham, with resulting injury to plaintiff. A direct solicitation of the job by him would have been in violation of union rules, Art. 1 § 30, providing: "Members shall not solicit work from any contractor or their representative. All employment must be procured through business office of Local Union 100. Violations of this Section subject to assessment of not less than Five Dollars ($5.00). * * * *."

Appellant argues the lack of evidence of any responsibility on part of the union for the acts of Lanham, the jury having found that with full knowledge of the conduct of Lanham, "the officers and membership of defendant Local 100 approved such conduct" (Issue 8). We think that record testimony already stated raise the issue. Zuefeldt, the business agent, also Galvin, successor to Lanham, testified to Borden's complaint of discrimination. B. C. Hall, had testified to attendance upon a business meeting of the union in October 1953 (the minutes of which were later lost) at which time Borden's case was discussed, it being stated that he "came in wrong and that plaintiff was not going to get the requested job because they (the union) weren't going to refer him to the job." Although no action was there taken by the membership, such inaction under the facts of this record must be held tantamount to approval

of the prior conduct of Lanham and a consequent ratification. Concerning silence or inaction as ratification, see Cameron v. Gibson, 278 SW 522 where the court quotes from 2 C.J.p. 504, 505 as follows: "Mere silence or delay on the part of a principal in repudiating the unauthorized act of an agent does not necessarily amount to a ratification, but while it is not necessarily conclusive evidence of a ratification, unless it cannot be explained on any other theory, it is always an element to be considered in connection with other evidence tending to show a ratification, and may alone be sufficient to justify a finding of ratification, particularly where the circumstances impose a special duty upon the principal to speak, as where the other party is liable to be misled or injured by his failure to do so." See also 2 C.J.S. § 57, p. 1126.

Excerpts of admitted testimony is quoted by appellant which is complained of as "inflammatory, irrelevant and incompetent." Such evidence relates principally to a prior practice of the local to refuse clearance cards to outside workmen; bearing, according to appellee, on knowledge by defendant of the discriminatory acts of Lanham. As such, they may be deemed relevant. Nor are the conversations had with Thurman, same being inclusive of the job offer to Borden excludable as hearsay. Thurman, the job foreman, was a member of said local, all members of which were adverse parties to plaintiff. In this connection, appellant says that the jury finding under issue one of the promise to plaintiff by Thurman, authorized foreman of the Farwell Construction Company, was contrary to the great

weight and preponderance of the evidence; and the testimony of Northington, general superintendent, is cited that "if anybody was hired I looked for one thing, that it was either Mr. Heath (plumbers) or Mr. George (steamfitters)." Here, while facts of the alleged agency may not be shown by declarations of the agent alone, such constitutes original evidence, and not objectionable as hearsay. Cook v. Hammer, (Sup.) 309 SW 2d 54. Thurman, plumber foreman, testified that workers on the Republic Bank job were hired by him, he calling Local 100 office and asked for men as needed, the union manager issuing a referral to the job site. Concerning authority to hire his own men, Thurman testified, to a conversation with Heath, plumbing superintendent, (now dead) as follows: "Q. Did you know Jack Heath? A. Yes, sir, very well. Q. What job did he have on that. A. He was general superintendent. Q. He did the hiring on the job, did he not. A. Not necessarily, he hired the foremans or set men up as foremans, but the foremans hired their own men as they sought fit." The testimony of Northington, general superintendent of Farwell, was in nowise contradictory to the above; his answers on cross-examination going no further than that he looked to George and Heath for satisfactory results. And issue one is not objectionable as multifarious and duplicitious. The fact of a job offer by Thurman to Borden is not disputed, the authority of the former to make such an offering being only at issue. Appellant could not have been injured by this combination of a disputed issue with the undisputed one. Goodrick v. First National Bank, writ ref., 70 SW 2d 609.

The jury found that though Borden failed to exhaust the remedies available to him through union channels, also that pursuit of remedies, rules and procedures of the union would have been useless. Appellant assets that plaintiff's claim is barred because of such failure, but the point is overruled. The Constitution and By-Laws of both parent association and defendant Local deal strictly with assessments, suspensions and expulsion, no where providing for a procedure whereby an allegedly wronged member may make claim for back wages or damages for discriminatory practices as in the instant situation and the testimony was clear that any application of union sanctions would have resulted only in the punishment of Lanham. Clearly, therefor, the pursuit of any remedies against the union by Borden would have been ineffectual, illusory and futile as well. In Anderson, et al. v. Painters' Local Union No. 318, 338 SW 2d 148 is stated the general rule as set forth in 168 ALR, pages 1472-1473 that: "* * * * it is pretty generally held that where exhaustion of remedies within the Union would amount to a practical denial of justice to the expelled or suspended member, or would be illusory or vain, it will not be insisted upon, particularly where property rights of the members are involved, as a condition to the right to invoke the aid of a court of equity for reinstatement to and restoration of membership." (emphasis ours).

Appellant contends that the suit should be barred by laches or estoppel. The material facts relative to this point have heretofore been sufficiently detailed. The action was brought approximately a year after it became clear to

plaintiff that he could proceed no further within the frame work of the union (except for the vain and illusory appeal just discussed) and no laches is shown, defined in 27 Tex. Jur. p. 16, as "inexcusable delay in asserting an equitable claim." Nor is equitable estoppel involved; an element of which is "the effect of the *voluntary* conduct of a party whereby he is absolutely precluded, both in law and in equity, from asserting the right that might perhaps otherwise have existed * * *." (emphasis ours). (22 Tex. Jur. 2d p. 664). Under the restrictive provisions of defendant's Local's By-Laws and Constitution, plaintiff had no alternative other than to work at other job sites on referrals by the union. Through economic compulsion plaintiff was required to accept these referrals and his action cannot be said to be voluntary within meaning of this equitable doctrine. There was no detrimental reliance thereon, or change of position by the union; and appellee though referred to other jobs did not abandon his quest for employment on the Bank site.

Appellant charges an absolute lack of evidence on which to base any punitive damages or of knowledge by the membership of the wilful nature of Lanham's conduct. The latter phase of such point has already been touched upon; as also the sufficiency of evidence in support of the jury's answer (Issue 8) that "the officers and members of said defendant Local Union approved such conduct." The term "wilfully" was properly defined and it is well settled that when the conduct is shown to be wilful, punitive damages are recoverable. Briggs v. Rodriguez, 236 SW 2d 510.

Lastly appellant says that the jury answers to issues 5 and 7 are contradictory and irreconcilable, and that because of such conflict a mistrial should have been declared. The jury answered "yes" to Issue 5 reading: "Do you find from a preponderance of the evidence that the said defendant Local Union 100, acting by and through Cleo Lanham, wilfully refused to let the plaintiff work on said Republic National Bank Building?" Issue 7, to which the jury answered "No" reads: "Do you find from a preponderance of the evidence that such refusal to let the plaintiff work on said Republic National Bank Building, if you have so found, was without any cause or reason whatsoever?" During its consideration of the latter issue the jury questioned the trial Judge as follows: "Does 'without any cause or reason' mean without any reason whatsoever (personal or otherwise) or does it mean with reason according to the union by-laws?" to which the court replied: "In answer to such communication you are instructed that: 'It means a cause or reason' which was actuated by an intent that was not in good faith. A denial, even though erroneous, which resulted merely from negligence, inadvertence or mistake would not be without any cause or reason whatsoever."

In due course appellee made motion to disregard the jury's answer to issue 7 as not ultimate or controlling and for judgment on the remaining answers which the courts granted and so found in final judgment.

Appellant now argues that "Findings 5 and 7, considered separately and taken as true, would compel different judgments. The Supreme Court, in its earlier decision in this

matter, stated that the union was not liable if Lanham's action, although wrongful, resulted from negligence, inadvertence or mistake. By Special Issue No. 7 the jury so found, and it follows that the union is not liable. On the other hand, the Supreme Court stated that if Lanham wilfully denied Borden a job opportunity, and other named conditions were present as well, the union was liable." We do not pause to interpret the effect of jury answer to Issue No. 7 aided (if it was) by the Court's extraneous instruction thereon in answer to their inquiry.

In the first place, Issue 7 was eliminated by the court in final judgment, its rendition being for plaintiff on the remaining jury findings. There could be no basis therefore for claim of irreconcilable conflict of issues; and while appellant took exception to the court's action in so disregarding issue No. 7 and answer, same was not brought forward in any point on appeal. Furthermore, the issue was evidentiary at best. In deciding whether these findings are in direct and irreconcilable conflict, the entire charge and all of the verdict must be considered. 41 Tex. Jur. p. 794, and we must not presume that the jury intended to render conflicting answers. Swift & Co. v. Phillips, 314 SW 2d 326. In Issue No. 5 the jury had already found that the conduct of Cleo Lanham was wilful; the term meaning, under the court's charge, "the intentional and purposeful disregard of the known rights of another". And any "cause or reason" for Lanham's refusal to refer plaintiff to the job site is explicit in the testimony of the latter, also Thurman's, already sufficiently detailed. The point is accordingly overruled.

Appellee's crosspoint No. 1 the jury had made an award to plaintiff of $5,000 as punitive damages which the trial court found to be "unjust and excessive under the facts and that the plaintiff should be required to remit to the extent of such punitive damages not to exceed the actual damages awarded * * * *." By subtraction, (Issues 9 & 10) the punitive damages awarded was reduced to $1,916. Appellee in turn asserts error in this requirement of remittitur of $3,084; pointing out that the jury verdict is not excessive under the test laid down in 13 Tex. Jur. p. 396, and followed by the adjudicated cases. However, in the recent case of Flanigan v. Carswell, 324 SW 2d 835 our Supreme Court held that a Court of Civil Appeals in passing upon a trial court's action in ordering a remittitur must determine propriety of the order by deciding whether such trial court has abused its discretion.

In the light of all the facts and circumstances of this cause, we cannot say that the action of Judge Stout in this connection was manifestly unjust and hence overrule the crosspoint.

All points of appeal are accordingly overruled and judgment of the trial court is in all respects affirmed.

YOUNG, Associate Justice.

DELIVERED:
FEBRUARY 9, 1962.

FOOTNOTE:

The same jurisdictional plea had been previously raised on appeal to this Court (315 SW 2d 458) and overruled but not interposed on writ of error to the Supreme Court of Texas. See 328 SW 2d 739.

Opinion of the Supreme Court of Texas
Delivered November 4, 1959

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA ET AL,

Petitioners,

v.

H. N. BORDEN,

Respondent.

From Dallas County
Fifth District

On the principal question in this case, we hold that a member of an unincorporated association can maintain an action against the latter for damages caused by an intentional wrong knowingly committed by one of its agents, provided the association participates in or otherwise authorizes or ratifies the wrongful conduct. The suit is an action for damages brought by H. N. Borden, respondent, against the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry and its Local Union 100, petitioners. Each petitioner is an unincorporated labor union. The trial court sustained Petitioners' pleas in abatement and dismissed the suit on two grounds, holding: (1) that respondent, as a member of the two labor organizations, has

no standing to maintain this suit against them for money damages; and (2) that the matters of which the respondent complains are within the exclusive jurisdiction of the National Labor Relations Board. Having concluded that neither of these contentions is sound, the Court of Civil Appeals reversed the judgment of the trial court and remanded the cause for trial. 316 S. W. 2d 458.

The holding of the Court of Civil Appeals that respondent's complaint does not lie within the exclusive jurisdiction of the National Labor Relations Board is not challenged here, and it is unnecessary for us to consider that question. We are confronted at the outset, however, by petitioners' contention that respondent did not perfect his appeal by timely filing an appeal bond. Within thirty days after the entry of final judgment in the district court, respondent filed a bond conditioned that he would pay all costs that might be adjudged against him in the suit. It did not specify the judgment from which he wished to appeal, and was not conditioned that his appeal would be prosecuted with effect.

Petitioners moved the Court of Civil Appeals to dismiss the appeal, and respondent thereupon requested and was granted leave to amend the bond. A proper appeal bond was then filed promptly, but this was after the expiration of the thirty-day period allowed by Rule 356, T.R.C.P. Petitioners argue that the original bond was in no sense an appeal bond and therefore could not be amended. We do not agree. Rule 430, T.R.C.P., provides that when there is a defect of substance or form in any appeal bond, then on motion to dismiss for such defect, the appellate court may allow the same to be

amended by filing a new bond. This authorizes the amendment of any sort of instrument which can be said to be a bond and which was filed for the purpose of taking an appeal. See Grogan Mfg. Co. v. Lane, 140 Tex. 507, 169 S. W. 2d 141. Although the original bond does not show on its face that it was intended to serve as an appeal bond, there is other evidence in the record which supports an implied finding by the Court of Civil Appeals that the same was filed in a bona fide attempt to invoke appellate court jurisdiction. We presume such a finding in support of its action, and hold that the intermediate court did not err in permitting the bond to be amended.

Turning now to the merits of the appeal, respondent alleged that he is now a member of the two labor organizations. While a member of the United Association's local union in Galveston, he was promised a job by Farwell Construction Company on the construction of the Republic National Bank Building in Dallas. After obtaining a clearance card from the Galveston local stating that he was in good standing and should be admitted to any other local union of the United Association, he went to the headquarters of Local Union 100 in Dallas for the purpose of being accepted into membership in order that he might take the job which had been promised him. In the meantime, Farwell Construction Company had placed a call with Cleo Lanham, agent and business manager of Local Union 100, for respondent to go to work on the bank building. Lanham at first refused to accept respondent's clearance card. Several days later, the card was accepted, but at the same time respondent was cursed and abused by Lan-

ham and informed that as long as the latter had power, he would in his capacity as agent and business manager see to it that respondent was never allowed to work on the bank. Although respondent thereafter submitted his complaint to the petitioners at a meeting, he was offered no remedy and was told that if he continued to complain he would be discharged from the union altogether.

It was further alleged that the petitioners, with actual knowledge of the acts of their agent and business manager, had acquiesced in and ratified same by their subsequent conduct in that respondent was never offered a remedy or allowed to work on the bank building; that petitioners have, without any cause or reason whatsoever, wilfully and discriminatorily refused to allow respondent to do such work; and that the wilful, malicious and discriminatory acts of the petitioners constitute a conspiracy and a wrongful interference with respondent's right to contract and work. There are also allegations of the amount which respondent would have earned on the bank job, and of his actual earnings in other employment he was able to find, and a prayer for actual and exemplary damages.

Petitioners contend and the trial court held that this case is governed by the general rule that an unincorporated association is not liable to one of its members for damages occasioned by the wrongful act of another member or agent of the association. The reason for such immunity is that the injured member and the association are regarded as coprincipals and the tort-feasor as their common agent. The wrongful conduct is thus imputable to the plaintiff for purposes of

his action against the association. See Annotation, 14 A.L.R. 2d 473. Typical of the cases in which these principles have been correctly applied are De Villars v. Hessler, 363 Pa. 498, 70 A. 2d 333, 14 A.L.R. 2d 470, where the plaintiff was injured as a result of the negligent operation of a steam table maintained by the defendant association at a county fair, and Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587, which holds that an unincorporated labor organization is not liable for injuries received by a member who tripped over a platform negligently placed by the officers of the union in a hall rented for a union meeting. In each instance the negligence occurred in the course of an undertaking which was for the benefit of all members of the organization, including the plaintiff, and under these circumstances it was entirely proper to impute the wrongful conduct to the latter.

It cannot be said, however, that a labor organization or other unincorporated association is never liable to a member for the wrongful conduct of one of its agents. Since the association's immunity rests upon the premise that the tortfeasor also acts as agent for the injured member, the rights and liabilities of the parties necessarily depend upon the relationship existing at the time the wrongful act is committed. For example, where the relation of principal and agent is deemed to exist between the plaintiff and the association's representative when the wrong was done, the former could not acquire a cause of action against the organization by simply terminating his membership. If anyone acting for the association is always to be regarded in law as agent for all of its members in whatever he may do, it would seem to

follow that a member could not even recover damages for wrongful expulsion. In such a case the plaintiff might not be a member at the time of suit, but this would not alter the fact that the association's representative was acting as his agent in expelling him from membership.

It is well settled, however, that a member does have a cause of action for damages against his union for wrongful expulsion. See International Printing Pressmen and Assistants' Union of North America v. Smith, 145 Tex. 399, 198 S. W. 2d 729; International Association of Machinists v. Gonzales, 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018. The question now under consideration is not discussed in these cases, but the reasons for holding that the union representative does not act as agent for a member who is wrongfully expelled are well expressed in Bonsor v. Musicians' Union, (Eng.) 3 W.L.R. 788, 3 All E.R. 518, as follows:

> "For the purposes of this appeal I am prepared to accept that proposition (i.e. the general theory that the agent is the agent of each member of the association) without inquiry as to what, if any, are the limits to be put on it. *But one of its essential ingredients is that the act complained of should be done by the agent on behalf of the injured member.* Was the Court of Appeal right in holding that the committee which expelled Mr. Kelly was, in so doing, acting as his agent? * * * *To say that this is done on behalf of the person expelled seems to me to be an unwarranted extension of the agency and quite out of keeping with reality.*"

There is thus at least one exception to the general rule that a union representative is to be regarded as an agent for all of its members in everything he does. The wrongful act will not

be imputed to an injured member if committed in the course of an undertaking that is strictly adverse to the latter's interests. This is simply another version of the agency rule that a principal is not liable for the torts committed by his agent while acting adversely to him. See C.J.S. Agency, § 259; Mechem on Agency, 2d ed. 1914 Vol. 2, p. 1311, § 1728.

The same idea is expressed in Taxicab Drivers' Local Union No. 889 v. Pittman, (Okla.), 322 P. 2d 153, which is similar in some respects to the present case. There the plaintiff had signed a petition to the international union making certain accusations against the officers and business manager of the local union. The international union made an investigation but took no action against the officers of the local union. Charges were thereafter filed against the plaintiff alleging that he had violated the provisions of the union constitution making it an offense to abuse fellow members. After a hearing which the court held was so unfair as to constitute no trial at all, the plaintiff was found guilty and sentenced to pay a fine and suspended from union activities for one year. Apparently he was not expelled from the union. On the next dues-paying date, the plaintiff tendered his dues but refused to pay the fine, and the union secretary declined to accept the dues unless the fine was also paid. Later the plaintiff was suspended from work by his employer at the request of the union pursuant to the provisions of a working agreement which required that all employees be in good standing with the local union. In the trial court the plaintiff was awarded recovery of actual and exemplary damages

against both the local and the international union. The judgment against the latter was reversed on appeal because of defective service of process, but the recovery against the local union was upheld. In disposing of the contention that the union could not be subjected to liability for the acts of its agents because the plaintiff-member was equally responsible for the wrongful conduct, the court said:

> "We note, however, that in each of those cases [holding that a labor union or other unincorporated association is not liable to a member for damage caused by the association's agent] the conduct of the agent was in the performance of his duty on behalf of the association in some project for which the plaintiff could reasonably expect to benefit just as much as any other member, at the inception of the project. * * * Common sense leads inexorably to the conclusion that officers of the Union causing plaintiff to be suspended from work without pay are anything but his agents for that purpose. The contrary conclusion would smack of flagellantism, an unlikely theory upon which to determine legal liabilities. The use of the agency doctrine under these specific circumstances has no support either in reason or public policy."

The contrary conclusion is not required by the decision in Brotherhood of Railroad Trainmen v. Allen, Tex. Civ. App., 230 S. W. 2d 325 (wr. ref.). In that case the union and the railroad had made a contract in settlement of claims for work which the latter had caused to be done by road crews instead of yard crews as required by the working agreement. By the terms of the settlement, the railroad was to pay a yard day to any available yard crew that would have been called to perform the work. Two members of the union then checked the records and advised the railroad which employees

were entitled to receive the money, and the funds were distributed among those so designated, about one-third being paid to extra men and two-thirds to regular men. Each of the plaintiffs was an extra man and was paid part of the award. They later brought suit against the railroad and the union, contending that they should have received practically all of the money that went to the regular men.

The plaintiffs there alleged that the actions of the railroad and the union were fraudulent in that they wilfully and knowingly contrived to benefit one group of employees at the expense of another group and that the collaboration of such defendants was a conspiracy against plaintiffs' rights, but the verdict does not support either of these theories. The railroad was dismissed prior to the trial, and no conspiracy issue was submitted. While the jury found, among other things, that the action of the union in designating others to receive the money was a fraud on the plaintiffs, the term "fraud" was defined as "an act, omission or concealment, which involves a breach of a legal duty, trust or confidence, justly imposed, and is injurious to another, or by which an undue and unconscientious advantage is taken of another * * *." The element of wrongful motive or intent was not included in the definition, and the answer to Special Issue No. 12 was simply a finding of legal or constructive fraud.

The union representatives in the Allen case undoubtedly were acting for the plaintiffs' benefit in making the settlement and in checking the records to ascertain how the money should be distributed. As a result of these activities, the plaintiffs were designated to and did receive part of the

funds. Any idea that the agents consciously worked against the plaintiffs' interest is effectively dispelled by the jury's determination that the distribution of the money was proximately caused by the negligent failure to check all available records. As the controversy reached the appellate court, therefore, it was simply a case of legal, but not wilful, fraud and discrimination resulting from negligence in performing services for the benefit of the plaintiffs and other union members. It was proper under these circumstances to impute the wrongful conduct to the plaintiffs and hold that they could not recover from the union for the dereliction of the joint agents.

The legal responsibility of an unincorporated association for the wrongful conduct of its agents should not be substantially different from that of an ordinary principal. The general rule is one principal is not civilly liable to another for the tortious acts of an agent who acts for both parties with their consent. He is responsible, however, where there is collusion with the agent, active participation in the wrongful act, or the same is otherwise authorized or ratified. See Ringer v. Wilkin, 32 Idaho 330, 183 P. 986; Boss v. Tomaras, 251 Mich. 469, 232 N. W. 229; Fuchs v. Leahy, 321 Mo. 47, 9 S. W. 2d 897; 3 C.J.S. Agency § 260. This was recognized in Blair v. Baird, Tex. Civ. App., 94 S. W. 116 (wm. dis.), where the court pointed out that "by the terms of the contract, O'Neal was the joint agent of the parties, and unless it had been shown that he had conspired with appellant Blair to defraud appellees, appellants would not be responsible for any misconduct on the part of O'Neal."

The present controversy has not been tried on the merits, and we do not know what the evidence will disclose. According to the petition, it was Lanham's duty to place the members of the union with their various job opportunitites. As long as he attempted in good faith to discharge that responsibility in a proper manner, his activities were calculated to benefit the respondent as much as any other member. If it appears that the denial to respondent of an opportunity to work on the Republic Bank Building, even though wrongful, resulted merely from negligence, inadvertence or mistake on the part of Lanham while trying to perform his duties fairly and impartially, petitioners are not legally responsible for respondent's damages. Brotherhood of Railroad Trainmen v. Allen, supra.

Under the pleadings, however, respondent is not confined to proof of negligence, inadvertence or mistake. He alleges that upon his arrival in Dallas, Lanham at first refused to accept his card; that when the card was later accepted, he was cursed and abused by Lanham and informed that the latter would see to it that he was never allowed to work on the bank job; that he was threatened with expulsion from the union if he continued to complain of this treatment; and that the acts of the defendants were willful and malicious and constitute a conspiracy. These allegations will support proof that respondent was willfully denied a job opportunity to which Lanham knew he was entitled under the rules and procedures established by petitioners for allocating work among their members, and that petitioners either conspired with Lanham to bring this about or otherwise authorized

or ratified his wrongful conduct. If these are the facts, we think the case represents another exception to the general rule mentioned above, and that respondent is entitled to maintain this suit against petitioners. It would be quite incongruous to say that the business manager was acting as agent for respondent in knowingly depriving him of all rights and privileges of union membership in so far as the Republic National Bank job is concerned.

We agree with the Court of Civil Appeals that the suit should not have been dismissed on the pleadings in their present form, and its judgment is affirmed.

Robert W. Hamilton
Associate Justice

RWH/p

Concurring opinion by Associate Justice Smith
Associate Justice Greenhill dissenting.

Opinion delivered:

November 4, 1959

In the Supreme Court of Texas

No. A-7058

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, ET AL.,

Petitioners,

v.

H. N. BORDEN,

Respondent.

From Dallas County
Fifth District

DISSENTING OPINION

I respectfully dissent. This is not a suit against the business agent who mistreated Borden. In my opinion, the legal principles here involved as to the Union are controlled by *Brotherhood of Railway Trainmen v. Allen* (1950), 230 S. W. 2d 325, writ refused, and *Atkinson v. Thompson*

(1958), 311 S. W. 2d 250, writ refused N.R.E., which follows the *Allen* case.

Joe Greenhill
Associate Justice

Opinion delivered
November 4, 1959

In the Supreme Court of Texas

No. A-7658

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA ET AL,

Petitioners,

v.

H. N. BORDEN,

Respondent.

From Dallas County, Fifth District.

CONCURRING OPINION

In concurring with the majority opinion, I feel constrained to set down my views relative to the improper action of the trial court in sustaining petitioners' plea in abatement and dismissing respondent's cause of action. The writ in the present case was granted because of the tentative view that the case of Brotherhood of Railroad Traimen v. Allen, Tex. Civ. App., 230 S.W. 2d 325, wr. ref. cert. den. 340 U.S. 934, 71 S. Ct. 501, rehearing denied 341 U.S. 906, 71 S. Ct. 611, was controlling and required a dismissal of Borden's suit. I do not agree with petitioners that the Allen case is controlling. However, since the writ has been granted, and since

the petitioners are entitled to a full analysis of the cases upon which they rely, as well as our reasons for declining to follow such cases, I respectfully file the following opinion.

The facts, as peaded, show that the agent of the Union in perpetrating the alleged wrongful acts was not in fact acting for Borden, although Borden alleged that he was and still was at the time of filing the suit a member of Labor Union 100. Borden alleged that on the 15th day of September 1953, he was promised a *job opportunity* on the construction of the Republic National Bank Building at Dallas, Dallas County, Texas, by Farwell Construction Company. Borden alleged that prior to such job offering, he was a member of labor union's local in Galveston, Texas; that he secured a clearance card from the Galveston union stating that he was in good standing and should be admitted to any other local union, but, that upon arrival in Dallas in September 1953, the Local Union 100, by and through its agent and business manager, Cleo Lanham, whose duty it was to accept Borden, refused to accept such clearance card; that Lanham so refused even though A. G. Thurman, a duty authorized representative of Farwell, had, by long distance telephone, given instructions that Borden had been employed and request was made that he be allowed to work; that on October 9, 1953 the labor unions finally accepted the clearance card, but at the same time Lanham, while acting in his official capacity, cursed and abused him, and thereafter did state and inform Borden "that as far as he, the said Lanham, had control and as long as he had any such power, he would in his capacity as Agent and Business Manager of the Union see to

it that this plaintiff would never be allowed to work on the *job opportunity* promised to him by Farwell Construction Company." The petition further alleges in substance that the labor unions acquiesced in and ratified such conduct, and that all of such actions and conduct on the part of labor unions and said agent amounted to a conspiracy, and constituted an interference with Borden's right to contract and his inherent right to work. Borden also alleged that he had a contract with both labor unions, and implied in such contract as a promise by the labor unions not to discriminate unfairly or unjustly or to deny a member a right to work, and that the acts complained of constituted a breach of such implied contract.

Borden's prayer was for damages in the total sum of $19,039.50. The sums of $5,000.00 for mental anguish, $4,039.50 as damages for loss of earnings, and $10,000.00 as punitive damages make up the total.

Borden's pleadings indicate a total loss of earnings on the Republic Bank job would have been $7,097.00. However, in mitigation of his damages, he pleaded that "as a result of being denied the job opportunity on the Republic National Bank Building, the plaintiff did attempt to find other work and did so find other wirk (sic) to-wit: Kiefer Plumbing Company, from which the plaintiff earned $1229.60; Rose Brothers Plumbing Company, from which the plaintiff earned $840.60; Spencer Brothers Plumbing Company, from which the plaintiff earned $997.30, but that the total of the amount earned during this period was $4,039.50 less than he would have earned had he been allowed to work on the Re-

public National Bank Building in Dallas, Dallas County, Texas, during the same period, to-wit: September 15, 1953, to September 15, 1954."

The labor unions filed separate pleas in abatement. The trial court sustained both pleas. The parent body, United Association, limited its plea to the claim that Borden had no standing to sue it for the reason "that a member of an unincorporated Association may not sue said Association for *dereliction of duty upon the part of agents of such* Association, but rather the member must sue the agents as individuals."

Local Union 100 limited its plea in abatement to the contention that the matters of which "plaintiff complains" are matters within the exclusive jurisdiction of the National Labor Relations Board pursuant to the Federal Labor Management Relations Act of 1947 (Taft-Hartley), which statute provides in pertinent part that it is an unfair labor practice for a labor organization or its agents "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157; PROVIDED, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *; (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *." Labor union's pleading continues: "The cited Federal legislation preempts the field and deprives this Honorable Court of the State of Texas of jurisdiction to hear and determine the matters alleged in plaintiff's petition for the reason that exclusive jurisdiction

of said matters are by federal statute, lodged in the federal administrative agency and the federal court, and plaintiff has wholly failed to seek, utilize, or exhaust remedies available before the federal agency and federal court under the federal law."

No evidence was introduced at the hearing on the pleas in abatement which began on November 30, 1956, and ended on February 15, 1957, when the trial court entered its judgment and order sustaining both pleas in abatement, reciting in the order "* * * and it appearing to the court that plaintiff is a member of defendant labor organizations and thus has no standing to sue said organizations for money damages; and it further appearing that jurisdiction of a suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the exclusive jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, and accordingly this court is without jurisdiction."

On appeal, the Court of Civil Appeals reversed both holdings of the trial court, and remanded the cause for trial. 316 S.W. 2d 458.

The jurisdictional question, supra, is not before this Court. The two points presented here are: (1) that a member of a voluntary unincorporated union has no right to recover money damages from the association of which he is a member for the dereliction of duty of the joint agent of the association members; (2) that the Court of Civil Appeals lacked jurisdiction by reason of Gorden's failure to perfect his appeal by timely filing an appeal bond.

I dispose of the questions in reverse order. The bond filed within the 30-day period provided by Rule 356, Texas Rules of Civil Procedure, even though defective, conferred jurisdiction, and since the Court of Civil Appeals granted permission and Borden filed an amended bond, that court had jurisdiction of the appeal. See Rule 430, T.R.C.P.; Pillow v. McLean, 126 Tex. 349, 88 S.W. 2d 702 (1935); Williams v. Wiley, 96 Tex. 148, 71 S.W. 12 (1902); Grogan Manufacturing Company v. Lane, 140 Tex. 507, 169 S.W. 2d 141 (1943); Lusher v. First National Bank of Fort Worth, Tex. Civ. App., 260 S.W. 2d 621 (1953), er. ref. n.r.e.

This brings me to the first point. I have heretofore pointed out that the labor unions contend that the question is controlled by the rule announced in the case of Brotherhood of Railroad Trainmen v. Allen, supra.

In order to be certain as to the pleadings, facts, and issues involved in the Allen case, the Clerk of this Court secured from the Clerk of the Court of Civil Appeals at Waco, Texas, the original record in that case. The transcript reveals that the case originally began as a suit against the Texas and New Orleans Railroad Company and the Brotherhood of Railroad Trainmen charging a conspiracy between the railroad and the Brotherhood, and further charging fraud. The pleadings in the alternative charged negligence in certain particulars on the part of the Brotherhood alone. At the close of the evidence, the railroad was dismissed from the case and the issue of fraud thereby went out of the case. Thereupon, 14 special issues were submitted to the jury. Thirteen of these issues were concerned with certain acts of alleged negli-

gence and discrimination on the part of the Brotherhood. The Brotherhood was found guilty of several acts of negligence, and the jury found that each act was a proximate cause, etc. Special Issue No. 12 was conditionally submitted upon a "yes" answer to either Special Issue 1a or 1c. Those issues read as follows:

> "Special Issue 1a: Do you find from a preponderance of the evidence that the Brotherhood of Railroad Trainmen, through its representative or representatives, designated persons other than available yard crews that would have been called to perform the work to receive payment under the awards involved herein?" Answer "Yes" or "No." Answer "Yes."
>
> "Special Issue No. 1c: Do you find from a preponderance of the evidence that the Brotherhood of Railroad Trainmen, through its representative or representatives, agreed to the designation of persons other than available yard crews that would have been called to perform the work to receive payment under the awards involved herein?" Answer "Yes" or "No." Answer "Yes."

Special Issue No. 12 reads:

> "Do you find from a preponderance of the evidence that the Brotherhood of Railroad Trainmen, in so designating or agreeing to such designation, if you have so found, (Special Issues 1a to 1c), practiced a fraud upon plaintiffs, or either or them?" Answer "Yes."

It is necessary to state the factual background, as reflected in the statement of facts in the record of the Allen case. After the dismissal of the issues of fraud, the Court was only concerned with the following pertinent facts bearing on negligence. Certain employees, (yard men) of the railroad, who were also members of a Railroad Brother-

hood, charged that the Brotherhood had negligently paid certain sums of money to the regular railroad crew in violation of the contract between plaintiff-employees and the Brotherhood. It was claimed that certain services within the Dallas yard, such as "picking up" cars, "setting out" cars, handling road engines, and turning engines and trains, under the contract between plaintiff-employees and the Brotherhood, were to be performed by the yard men and not the road crew. The plaintiff-employees alleged that the Brotherhood, a voluntary association, was, and had been for many years, the collective bargaining agent of the yard employees (plaintiffs), and under the terms of its membership contract with plaintiffs was obligated to represent them without discrimination in all disputes with the railroad. The plaintiffs' charge that the Brotherhood acted discriminatorily is found in the allegation that the Brotherhood, in distributing the funds involved, caused "some employees to get larger shares of the $60,616.20 than they were entitled to and caused plaintiffs to get far less than the amounts to which they were entitled and therefore the Brotherhood wrongfully deprived plaintiffs of the sums of which they were entitled." Plaintiffs sought judgment against the Brotherhood for all sums due under the contract dated March 1, 1946, between the Railroad and the Brotherhood (acting for plaintiffs-yard men). The railroad was dismissed from the suit. The Court of Civil Appeals in its opinion in the Allen case states that A. L. Weiss and Doyle Andrews were the agents and representatives of plaintiffs as well as all other members of the Union; that Weiss

selected Andrews to check the records; that Anderws did check the records; Weiss was present part of the time. After the check was made certain members were designated and certified to the railroad as being entitled to receive the funds; that the plaintiffs, as appellees, were contending that had all of the available records been checked, it would have been ascertained that the extra men and not the road crew would have been entitled to receive most if not all of the money paid by the railroad under the awards.

Although the fraud issue was submitted, it is clear that when the case reached the Court of Civil Appeals for decision and when that court finally rendered its judgment, the dismissal of the railroad company from the suit effectively eliminated all issues of conspiracy and fraud and the Court of Civil Appeals decided only the narrow question relative to the charged acts of negligence on the part of the agents of the Brotherhood.

The Brotherhood's points, which were the only points considered and sustained in the Allen case were as follows:

"*Point Ten*

"Since the plaintiffs are members in good standing of the Brotherhood, which is a fraternal benefit association and labor union bargaining for the craft in the employment in which plaintiffs were engaged, plaintiffs cannot sue the Brotherhood for the acts of any Brotherhood agent, even though said acts were negligence, since the agents of the Brotherhood, being also members of the Brotherhood, are agents of the plaintiffs and each of them, and the Brotherhood is not liable to any member for the negligent acts of another member thereof."

"Point Eleven

"Each of the plaintiffs being a member in good standing of the Brotherhood, which is an unincorporated fraternal benefit association, as well as labor union, cannot sue the Brotherhood for the negligence of a brother member alleging that said member was a negligent agent of the Brotherhood, and since the agent is also the agent of the plaintiffs, even though the agent's act was negligent, if any one was liable to plaintiffs, it would be the agent and not the Brotherhood. Therefore the trial court erred in submitting issues of negligence of the Brotherhood to the jury and in failing to sustain defendant's motions for instructed verdict and defendant's motion for judgment non obstante veredicto."

This being the state of the record, the Court of Civil Appeals held, in effect, that the agents, Weiss and Andrews, were joint agents of plaintiffs and the Unions and all other members of the Union, and that under such circumstances, the plaintiffs had no cause of action against their coprincipals for the dereliction of common agents, citing Hromek v. Gemeinde (1941) 238 Wis. 204, 298 N.W. 587, and other cases. In the Hromek case, supra, it was held that no liability on the part of an unincorporated labor union existed in favor of a member who in a hall rented by the Union for purposes of its meeting, tripped over a platform negligently placed in the room by the officers of the Union and received injuries. The Court rested its decision on the ground that the officers of the Union were not only acting for the Union and all the other members but also for the plaintiff, and that plaintiff could not sue her coprincipals for the dereliction of a common agent. See 15 A.L.R. 2d 475.

In the case of Koogler et al v. Koogler, (1933) 127 Ohio St. 57, 186 N.E. 725, another case cited by the Court in the Allen case, the trustees of an unincorporated beneficial association were held not liable in damages to a member of the association for personal injuries sustained by him as a result of the failing of a fire-escape ladder on the sidewalk by the breaking of its suspending cable when he was walking on the sidewalk preliminary to replacing a glass on a broken window for the association. The ground of the decision was that since members of an unincorporated beneficial association are joint enterprisers, the tort of the association is the tort of all the members, including the plaintiff himself, and the plaintiff cannot sue himself for a tort committed by himself. The Court, however, in this latter case where the right of a member of an unincorporated association for injuries as the result of the negligence of the association was involved, distinguished such case from those cited by the plaintiff on the ground that in some of the cited cases the defendant was a corporate entity, in others a contractual relation was involved, in others the party suing had not as yet become a member, in others actions for expulsion was involved, and in still others the party suing had ceased to be a member. In this case, as well as in the Allen case, the Court, in distinguishing the cases, recognized the right of a member of a voluntary association to be protected in the enjoyment of membership against any unauthorized act or proceeding on the part of his fellow members, either as individuals or in their official or collective capacity, by which this enjoyment of such right would be impaired or destroyed.

The application for writ of error in the Allen case was refused. The Brotherhood stated in its reply to the application for writ of error that "neither seniority rights, expulsion, nor the rights of members to work and earn a living are questioned in this case." The effect of this argument is to, in a measure, admit that if expulsion or the right to work and make a living had been involved, the plaintiffs' contention would have been correct. The Allen case stands for the proposition and its effect should be limited to instances where the union member bringing the action is equally responsible for the dereliction of the union representatives. The Allen case was fully developed and a complete trial of the issues was allowed, whereas, our Borden case went off on a plea in abatement. Borden has never had his day in court. The Brotherhood in the Allen case was in a position to discuss the constitution and bylaws of the association. Such instruments were introduced in evidence. Not so here. They were able to show that the members were seeking to invoke the rights of the Brotherhood to be free from destructive suits where no cause of action really existed.

The other Texas case relied upon by petitioners is that of Atkinson v. Thompson, Tex. Civ. App., 311 S.W. 2d 250 (1958), er. ref. n.r.e. July 9, 1958. The Court of Civil Appeals, in holding that the plea in abatement was properly sustained, cited the Allen case in support of such holding. The pleadings and the facts were different than those finally passed upon in the Allen case. Atkinson pleaded, in the alternative, that the "Brotherhood actually instigated his discharge and said denial of his rights of seniority, and con-

spired with Guy A. Thompson, Trustee, to deprive him of his rights or seniority, all to his damage in the amount of $7,000."

The railroad and the Brotherhood each filed a plea in abatement. The trial court sustained such pleas and the Court of Civil Appeals affirmed. The opinion of the Court of Civil Appeals contains language which may be interpreted as supporting the petitioners' position in the present case. The opinion, to the extent that it expresses holdings contrary to the holding by the majority and in this concurring opinion, should be expressly overruled. This should be done even though refusal of the writ, n.r.e. could be justified because of failure of the petitioners to properly preserve the point in this Court. Atkinson's pleadings of conspiracy and fraud, and the nature of the two pleas in abatement are set out in the opinion. The Court of Civil Appeals made its holding that "the real reason appellant cannot sue for the wrongful act of the agent of the Brotherhood is that as a member of the Brotherhood he is jointly responsible with all other members for the actions of the group itself, and accordingly as a principal he has no cause of action against coprincipals for the wrongful conduct of a common agent," in the light of Atkinson's pleadings. The court, in construing the Allen case, states that the railroad was dismissed, but it gives no effect to the fact that the dismissal also eliminated all issues as to wrongful participation in or ratification of the intentional wrong knowingly committed by one of the agents of the Brotherhood. For the reasons stated, I would not overrule the Allen case, but would overrule the Atkinson case.

The petitioners also rely upon the case of Marchitto v. Central Ry. Co. of N.J., 88 A. 851. It is clear from the opinion that in answering the question: "Did the complaint state a cause of action against the defendants," the Supreme Court of New Jersey, speaking through Chief Justice Vanderbilt, confined its holding to the issues, as made by the pleadings, between the plaintiff on the one hand and the Brotherhood and its agent, Giles, on the other. The court held no cause of action had been stated against the Brotherhood, but that as against Giles, the pleadings stated a cause of action. The cause of action against the railroad was ordered stricken by the trial court. Subsequent to this action, the trial court sustained the contention of the Brotherhood and Giles that the complaint (plaintiff's pleadings) failed to state a cause of action. It appears from the opinion that the court simply held that the Brotherhood was an unincorporated fraternal association; that it was not a separate legal entity and had no existence apart from that of its individual members; that in legal effect the plaintiff and every other member of the Brotherhood are co-principals joined together in a joint enterprise to accomplish a common purpose with their relationships to each other and to the group being governed by the Association's constitution and the bylaws or rules adopted pursuant thereto, and by the common law, and as a member of the group the plaintiff was jointly responsible with all other members for the actions of the group itself, and as a principal he had no cause of action against his co-principals for the wrongful conduct of their common agent. It cannot be successfully argued that the holding thus an-

nounced can be extended so as to control the decision in the present suit. The court apparently adopted the theory that the Brotherhood defendants were not in fact and in law the plaintiff's agents. The court said:

> "• • • It is universally recognized that an agent stands in a fiduciary relationship to his principal and is under a duty to be careful, skillful, diligent and loyal in the performance of his principal's business and that for a failure so to act he subjects himself to liability to his principal, 2 Am. Jur., Agency, §§ 251,252,274; 3 C.J.S., Agency, §§ 138,155, 162,172,286; 2 Restatement Agency, §§ 379,387,399. Since the complaint here charged these defendants with negligence, carelessness, fraud and breach of trust and made appropriate allegations of fact in support thereof, it necessarily follows that a good cause of action was pleaded, if these defendants were in fact and in law his agents."

It does not appear that a conspiracy had been entered into between the railroad and Brotherhood, as alleged in the present case, to deprive the plaintiff of the right to work or that the Brotherhood participated in a wrongful act against the plaintiff.

The case of Frederick Duplis v. Rutland Aerie No. 1001, Fraternal Order of Eagles, 118 Vt. 440, 111 A. 2d 727 (1955), relied upon by petitioners, was an action in tort to recover damages for injuries suffered by the plaintiff, a member of the defendant, Fraternal Order of Eagles. The injuries were sustained when the plaintiff tripped and fell on the stairway while leaving the defendant's premises. The court in upholding the action of the trial court in sustaining defendant's general demurer to plaintiff's petition, held,

in effect, that the plaintiff, having admitted in his pleadings and in oral argument that the defendant was an unincorporated association, and that at all material times the officers and agents were co-members with the plaintiff, that the trial court properly sustained the contention that the alleged acts of negligence of the agents were imputed to all members, including plaintiff, thereby precluding a recovery.

The facts as revealed by the pleadings in the present case bring it within the rule announced in cases where membership in a voluntary association has once been acquired, protection against expulsion or the deprivation of the right to work will be afforded by the courts. See Lundine v. McKinney, Tex. Civ. App., 183 S.W. 2d 265, no writ history; Dingwall v. Amalgamated Association, etc., 4 Calif. App. 565, 88 P. 597; 3 California Jurisprudence, 350, par. 5; Taxicab Drivers Local v. Pittman, (Okla. S.Ct. 1957), 322 P. 2d 159, 41 LRRM 2045; Selles v. Local 174 of International Brotherhood of Teamsters, etc., (Washington S. Ct. 1957), 50 W. 2d 660, 314 P. 2d 456, 40 LRRM 2573.

Since no evidence was presented at the hearing on the plea in abatement, the allegations contained in Borden's pleadings must be taken as true. The pleadings show that Borden was as effectively deprived of the right to work on the Republic National Bank job as if he had been expelled from membership. The fact that he worked on other jobs does not change the situation. The Constitution and Bylaws of the Association were not introduced in evidence. However, we must assume, in the light of the pleadings, that Borden, in gaining

membership, did not contract and agree to be bound by acts which would deprive him of the right to work. As was held in the Dingwall case, supra, "* * * Membership in a social or beneficial association is in itself a personal right, especially when the purposes of the association include the amelioration or improvement of the condition under which the members obtain their livelihood, and the holder of such right is entitled to be protected in its enjoyment against any unauthorized act or proceeding on the part of his fellow members, either as individuals or in their official or collective capacity, by which his enjoyment of such right will be impaired or destroyed."

It cannot be successfully said that the agents of the labor unions in depriving Borden of the right to work on the Republic National Bank job were acting as agents on behalf of Borden. On the other hand, it should be noted that in the Allen case, supra, the agent was acting in the performance of his duty on behalf of the plaintiffs in such manner that the plaintiffs could reasonably expect to benefit just as much as any other member. As the inception of the controversy, the matter in dispute was left to the agent. That agent was acting in behalf of the plaintiffs. Here we have, as pointed out above, quite a different situation. One of the "essential ingredients is that the act complained of should be done by the agent on behalf of the complaining member." See Bonson v. Musicians' Union (1955 House of Lords), 3 W.L.R. 788, 3 All E.R. 518; Taxicab Drivers Local v. Pittman, supra.

The agents of the union in the present case were not Borden's agents for the purpose of denying him the right to

work on the Republic National Bank job. In the Pittman case, supra, the Court said: "Common sense leads inexorably to the conclusion that officers of the Union causing plaintiff to be suspended from work without pay are anything but his agent for the purpose. The contrary conclusion would smack of flagellantism, an unlikely theory upon which to determine legal liabilities. The use of the agency doctrine under these specific circumstances has no support either in reason or public policy." The reasoning in the Pittman case applies with equal force here.

This case has not been decided on its merits. The majority recognizes this fact, but proceeds to instruct the trial court how it should rule in the event it should appear that the denial to respondent of an opportunity to work on the Republic Bank Building, even though wrongful, resulted merely from negligence, et cetera. It is sufficient for this Court to confine its opinion to the questions presented as the result of the error of the trial court in sustaining the plea in abatement.

The respondent is entitled to a trial, and it will be for the trial court to direct that trial. I join in affirming the judgment of the Court of Civil Appeals.

Clyde E. Smith
Associate Justice

Nov 4—1959

Opinion of the Court of Civil Appeals
Delivered July 25, 1958

H. N. BORDEN,

Appellant,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, et al.,

Appellees.

On Rehearing from a District Court of Dallas County.

Our opinion heretofore delivered in this case is withdrawn and the following opinion is substituted.

This is a damage suit brought in the 101st District Court of The State of Texas against two unincorporated labor unions by H. N. Borden, appellant, who alleges that he is a member of both organizations. The two organizations are United Association of Journeymen and Apprentices of the Plumbing and Pipefitting industry of the United States and Canada, and Local Union 100 of said Association.

The trial court dismissed the suit on the grounds that (1) appellant "is a member of defendant labor organizations and thus has no standing to sue said organizations for money damages; and (2) "jurisdiction of a suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the exclusive jurisdiction of the National Labor Re-

lations Board under the Federal Labor Management Relations Act, and accordingly this court is without jurisdiction."

In his petition appellant makes the following allegations: on September 15, 1953 he was promised a job in the construction of the Republic National Bank Building in Dallas, Texas, by Farwell Construction Company through the Company's superintendent and also one of the Company's foremen; appellant thereupon obtained a clearance from his local union in Galveston, Texas, where he then lived, came to Dallas, presented himself to Local Union 100 at Dallas for the purpose of being accepted in order that he might go to work on the job promised by Farwell Construction Company; Local Union No. 100 at first refused to accept appellant's clearance card, but finally on October 9, 1953 did accept said clearance card; nevertheless said Local Union No. 100, in violation of Art. 5207a V.A.C.S., did then and has since continued willfully, maliciously, discriminatorily and without cause to refuse to allow appellant to go to work on the job offered him in the construction of the Republic Bank Building; appellant thereafter sought redress by submitting his claims to appellee unions at a meeting held October 18, 1954, but no remedy was offered to him by either union—in fact only a threat made against him that if he should continue his complaint he would be expelled from the unions; appellant then sought and obtained employment elsewhere at a wage less than he would have been paid on the Republic National Bank job; and that the difference in wages during the period of time involved was

$4,039.50. Appellant asked judgment for $4,039.50 damages for lost earnings, $5,000.00 as damages for mental anguish and suffering, and $1,000.00 as exemplary damages.

The only questions before us on this appeal are: (1) whether appellant had a right to sue appellee unions of which he was a member; and (2) whether such suit might be brought in a State court of the State of Texas.

The two labor unions, though unincorporated, are legal entities subject to being sued. International Association of Machinists v. Gonzales, 78 S. Ct. 923; United Mine Workers of America v. Coronado Coal Company, 259 U. S. 344, 66 L. ed. 975, 42 Sup. Court. 570. In International Longshoremen and Warehousemen's Union, Decisions and Orders of N.L.R.B. Vol. 79, p. 1508, Note 40, (1948), it is said:

> "The common law concept of an unincorporated labor organization as a group of individuals having no separate entity apart from its members has been discarded to the extent that it was not already outmoded in modern jurisdiction—by the Labor Management Relations Act, 1947. It is clear that the Act treats labor organizations for all practical purposes as juridical entities."

The action may be a suit for damages. International Association of Machinists, et al., v. Gonzales, (Sup. Court of United States, May 26, 1958); 78 S. Ct. 923; Selles v. International Brotherhood of Teamsters, etc., 314 P. 2d 456.

In this case appellant is asserting a property right—the right to seek employment, work, and earn a living. Inter-

national Printing Pressman and Assistants' Union of North America v. Smith, 198 SW 2d 729; 145 Texas 399; Gurtow, et al., v. Williams, et al., 105 SW 2d 328. Under the circumstances he has a right to sue the labor unions though he is a member of the unions. Choate v. Grand International Brotherhood of Locomotive Engineers (Sup. Court of Texas, July 9, 1958); Lundine v. McKinney, 183 SW 2d 265; McCantz v. Brotherhood of Painters, Decorators and Paperhangers, 13 SW 2d 902; Dusing v. Nuzzo, 29 N.Y.S. 2d 882; Nissen v. Int. Brotherhood, 141 A. L. R. 598, 610; Art. 5154G, Secs. 4 and 3, V.A.C.S.; Art. 5207a V. A. C. S. Appellant's first point on appeal is sustained.

With reference to appellant's second point on appeal, it is the contention of appellee that the National Labor Relations Board has exclusive jurisdiction of appellant's claim, hence suit may not be brought in a State Court. Appellee relies on 29 U.S.C.A. Sec. 158 (b) (2), Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Act.

We are unable to agree with appellee. Appellant's suit is a tort action for damages. The National Labor Relations Board does not have jurisdiction of such claims. In United Construction Workers v. Laburnum Const. Corp., 347 U. S. 656: 74 Sup. Court 833, it is said:

> "Petitioners contend that the Act of 1947 has occupied the labor relations field so completely that no reg-

ulatory agency other than the National Labor Relations Board and no court may assert jurisdiction over unfair labor practices as defined by it, unless expressly authorized by Congress to do so. They claim that state Courts accordingly are excluded not only from enjoining future unfair labor practices and thus colliding with the Board, as occured in Garner v. Teamsters Union, 346 U.S. 485, 74 S. Ct. 161, but that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. * * * * *Congress has neither provided or suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct.* For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act. * * * * *The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay.*" (emphasis ours).

We hold that the State Court has jurisdiction of appellant's suit. Choate et al., v. Grand International Brotherhood of Locomotive Engineers (S.Ct. of Texas, July 9, 1958); International Association of Machinists v. Gonzales, 78 S.Ct. 923; United Automobile Workers v. Russell, 78 S. Ct. 932; Selles v. Local 174, International Brotherhood of Teamsters, etc., 314 P. 2d 456; Baun v. Lumber & Sawmill Workers Union, etc., 284 P. 2d 275. Appellant's second point on appeal is sustained.

The judgment of the trial court is reversed and the cause is remanded for trial on the merits.

REVERSED AND REMANDED.

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DIXON, Chief Justice.

Delivered July 25, 1958.

Opinion of the Court of Civil Appeals
Delivered April 11, 1958

H. N. BORDEN,

Appellant,

v.

UNITED ASS'N. OF JOURNEYMEN & APPRENTICES, et al.,

Appellees.

From a District Court of Dallas County.

This is a damage suit. The appellant is a member of the appellees who are unincorporated labor unions. He brought suit against such unions for damages growing out of a dispute wherein it is alleged that the appellant was arbitrarily and maliciously disallowed by said appellees to be employed by Farwell Construction Company, which had offered appellant an opportunity to work. Appellees filed a plea in abatement based on two counts: (1) That a member is not allowed to sue the union, and (2) the actions complained of were within the exclusive jurisdiction of the Labor Management Relations Act. On hearing before the court the plea in abatement was sustained on both counts and the cause dismissed. This appeal has been duly perfected from such judgment and order, appellant here briefing two points of error.

Point 1 in substance asserts error in the trial court's holding that a member of an unincorporated union cannot

sue the union for money damages since not legally allowed to do so. Countered in substance by the union that a member has no standing to sue it for money damages allegedly arising from dereliction of an agent of the union.

The general rule is that an employee cannot sue his union. However there are exceptions to the general rule. Three necessary facts must be established before such suit can be maintained, to-wit: (a) A property right or its equivalent must be involved; (b) a violation of the Constitution or Charter in the acts complained of must be shown: and (c) a resort to the internal processes of the organization for redress must have been exhausted or shown to be futile. Ducing v. Muzzo, 29 NYS 2d 882. Ordinarily hardship to the member is not in issue and acts in conformity with the Constitution and rules of the union are ordinarily enforcible. The record here shows no complaint by Borden against the agent of the union who is alleged by Borden to have wronged him. In Brotherhood of Railroad Trainmen v. Allen, 230 S.W. 2d 235, error ref., cert. den. 340 U. S. 934, 71 S. Ct. 501, rehearing denied 341 U. S. 906, 71 S. Ct. 611, it is held that:

"If Weiss and Andrews, or either of them, committed any fraud or failed in his or their duty to properly represent the appellees and as the result of which they sustained damages, they could be held accountable to the appellees therefor, because a principal can sue his agent for such dereliction of duty. This principal is so well established that it needs no authorities cited to support the same. The appellee's comembers, if they received money to which they were

not entitled but to which the appellees were, the appellees would have a cause of action against members as individuals. The appellees and the other several hundred thousand members are principals, and we are of the opinion that one or more principals cannot sue their coprincipals and require them to respond in damages for the dereliction of duty as a joint agent. Weiss and Andrews were just as much the agents of appellees as they were the agents of the other members of the brotherhood. The Brotherhood being a benefit fraternal society, its assets are held jointly between all of its members, including the appellees, and they say that only twenty members received a part of the award that they were not entitled to. None of the other several hundred thousand members received any part of the fund, nor did they take any part in its distribution; and to require them to bear a proportionate part of the loss sustained by the appellees from the dereliction of the joint agents of all in order that they might receive the full amount that they claim they were entitled to received under the agreement, is not a sound legal principle. To hold otherwise it would furnish a means by which the Brotherhood could be destroyed by one or more of its own members. They are, in effect, suing themselves (Citing cases)." See 87 C.J.S. 867, note 11 citing above case.

Appellant Borden not having shown facts necessary to bring his claim within the exceptions before he can sue the unions, he cannot recover. The holding in the Allen case is applicable here. Point 1 is overruled.

Point 2 asserts error in holding the acts complained of by Borden are within the jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, since the acts complained of by Borden are not within the coverage of such Act. Countered that the NLRB has exclusive jurisdiction of a claim by a workman based on the *union's attempt to wrongfully deprive him of employment.*

Local Union 100 by way of abatement asserts that the matters here involved are within the exclusive jurisdiction of the NLRB under the FLMR Act of 1947 (Taft-Hartley Act) which provides it is an unfair labor practice for the union or its agents "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *." And that such preempted the field and deprives the State Courts of jurisdiction here and that Borden has not sought or exhausted such available remedies; also pled the same reasons and facts as exceptions, and as defense on the merits.

The acts complained of in the pleadings were that the union accepted his clearance card, but then and thereafter has wrongfully and discriminately refused to allow him to go to work on the Republic Bank Building without any cause whatsoever, which constituted an interference with

his right to contract and his inherent right to labor; that such acts of this Local 100 constituted a monopoly through restraint of his free pursuit of the lawful trade or occupation which was unreasonable and unjustified; that he submitted his complaint to the unions at a meeting on December 18, 1954, but no remedy was offered him—only a threat that if he continued to complain he would be discharged from the union, all in violation of Art. 5207a V.A.C.S.,; which constituted an interference with and denial of his right to work and bargain freely with his employer; pled specifically a loss of job opportunities in the sums set out and sought actual damages totaling $4,039.50 and $10,000.00 exemplary damages. Also pled he did not take such job opportunities because of the threatened expulsion and because of failure of union clearance.

Borden contends that he complains of malicious and discriminatory and willful acts of the unions in refusing to allow him to pursue his employment even after they knew of the occurrences complained of; that his employment, although he had the job opportunity, was never consummated because of the union's threatened expulsion based on his failure to get union clearance.

The union contended that the acts asserted by Borden were within sec. 158(b)(1) and 158(b)(2) of the FLMR Act and that such Act preempts the field so as to deprive State Courts of jurisdiction which in substance provides that a union or its agents shall not interfere with the rights guaranteed by sec. 157; that sec. 157 gives employees the right of self organization, to form, join or assist organiza-

tions to bargain collectively and to engage in other concerted activities, or for any other mutual benefit; also gives the employee the right to refrain from such authorized acts except to the extent that such right might be effected by an agreement requiring membership in a labor organization as a condition of employment as authorized by sec. 158(a)(3), Title 29 USCA. Sec. 158, Unfair Labor Practices. Sec. 158(a)(2) provides that it shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment to encourage or discouage membership in any labor organization.

Section 158(b)(1) and 158(b)(2) provide that it shall be an unfair practice for a labor organization, or its agents, (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in sec. 157, and this title provided that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representative for the purpose of collective bargaining or the adjustment or grievances. (2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to when membership in such organization has been denied or terminated on some ground other than his failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The record here shows that the employer placed a call for Borden and it was thereafter that the unilateral acts of

the agents of the union solely caused Borden's failure to work on the job involved. There was no issue of conspiracy raised by the evidence, and the matters involved in this action are, in our opinion, within the coverage of the Labor Management Relations Act. Point 2 is overruled.

Appellee has briefed a counterpoint numbered three, in substance that the Court of Civil Appeals lacks jurisdiction by reason of appellant's failure to perfect his appeal by timely filing an appeal bond.

The transcript shows the final judgment was entered February 15, 1957 and the bond bears the District Clerk's filemark of March 12, 1957, and the certificate of approval of the bond by the District Clerk is also dated March 12, 1957. The appeal bond was therefore duly perfected under Rule 356, R.C.P.

The appeal bond here involved having been filed within the time required in Rule 356, R.C.P., and approved by the District Clerk, even though defective, perfected the appeal. If defective, it was subject to amendment any time the question should be raised, and, if properly amended, such amendment relates back to the date of the filing of the original bond. The counterpoint is overruled.

Finding no reversible error in the trial court's judgment, it is

AFFIRMED.

CRAMER

Associate Justice.

Delivered April 11, 1958

APPENDIX B

Order of the Supreme Court Refusing Application for Writ of Error.

In the Supreme Court of Texas

No. A-8993

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES et al.

v.

H. N. BORDEN

From Dallas County, Fifth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicant, Local 100 of the United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada, and its surety, National Surety Corporation, pay all costs incurred on this application.

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I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a

true and correct copy of the judgment or order of the Supreme Court of Texas on application for writ of error in the case of Local 100 of The United Association of Journeymen & Apprentices et al. vs. H. N. Borden, No. A-8993, from Dallas County, Fifth District, as such judgment or order appears of record in the minutes of said Court under date of July 25, 1962.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 1st day of October, A. D. 1962.

GEO. H. TEMPLIN, Clerk
By /s Carl B. Lyda
Deputy.

(SEAL)

APPENDIX C

Trial Court Judgment and Jury Verdict

(Tr. 106-120)

No. 2803

In the 101st Judicial District Court of Dallas County, Texas

H. N. BORDEN

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA
AND
LOCAL UNION 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

JUDGMENT

ON this the 18th day of July, 1960, the above entitled and numbered cause coming on for trial in its regular order, came the parties and announced ready for trial, and, a lawful jury being duly called, selected and sworn for the trial of said cause, the pleadings and evidence were heard by the Court and the jury, and at the conclusion of the evidence, the Defendant filed its motion for directed verdict, and, the Court being of the opinion that Judgment should be entered, as a matter of law, for the Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, the Court

gave the jury a peremptory instruction to return a verdict for the Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and such verdict being rendered in obedience to the instruction, it is therefore ordered, adjudged and decreed that Plaintiff take nothing by his suit against Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and that said Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada recover of Plaintiff its costs in this behalf expended and go hence without day, to which action of the Court the Plaintiff then and there in open court excepted and gave Notice of Appeal to the Court of Civil Appeals for the 5th Supreme Judicial District sitting at Dallas, Texas; and the Court being of the opinion that the motion for directed verdict on behalf of Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada should be in all things overruled, the Court did thereupon overrule such Motion of Defendant Local 100 and submit the case to the jury upon Special Issues, and the jury, on their oath, do, for their verdict, and in response to the following Special Issues, Definitions and explanatory instructions submitted to them by the Court on July 21, 1960, make the following respective findings:

This case is submitted to you upon Special Issues in the form of questions. In arriving at your answers to these Spe-

cial Issues, there are standards of conduct to be followed, and rules of propriety to be obeyed, which, if disregarded, could make a nullity of these proceedings, and all our efforts could be wasted:

1. You will not be concerned with the effect of your answers, nor the judgment that the Court may render after considering your answers. Neither should you speculate upon who might win or lose the case by such answers.

2. Your answers should be determined without bias, prejudice, sympathy, resentment or any other emotion, except to honestly reflect your findings to the question asked.

3. It is always improper to speculate about, consider, discuss or even mention costs of litigation, attorney's fees, or any other similar matter not shown by the evidence.

4. You should not mention—nor testify to—any personal knowledge, or information you may have about any fact or person connected with this case, which is not shown by the evidence.

5. When words used in the issues are not used in their ordinary meaning, or have a particular meaning, a proper definition of such words will be submitted to you. You will accordingly receive the law of this case only from the Court as given you in this charge and be governed thereby.

6. You are the exclusive judges of the facts proved, the truthfulness and credibility of the witnesses, and the weight to be given their testimony.

7. By the term "wilfully", as used in this charge, is meant the intentional and purposeful disregard of the known rights of another.

The questions asked are usually begun with the phrase, "Do you find from a preponderance of the evidence" that a certain event, act, omission or transaction took place. A "preponderance of the evidence" is defined in the law as the greater weight and degree of credible testimony.

By the term "mental anguish" as used in this charge, is meant the intense pain of body or mind and a high degree of mental suffering and not mere disappointment or regret. The emotion of anger is not classed as mental suffering.

By the term "authorized" as used in this charge is meant that which is done by one in the interest of another by his authority or with his consent.

By the term "detriment" as used in this charge is meant any loss or harm suffered in person or property.

SPECIAL ISSUE NO. 1:

Do you find from a preponderance of the evidence that on or about September 15, 1953, the Plaintiff H. N. Borden was promised a job on the construction of the Republic Bank Building in Dallas, Texas, by the authorized foreman, if any, of the Farwell Construction Company?

Answer "Yes" or "No"

ANSWER: Yes

SPECIAL ISSUE NO. 2:

Do you find from a preponderance of the evidence that at a time when the Plaintiff was available for work, if he was, a call was placed by A. G. Thurman calling for Plaintiff to go to work upon the Republic National Bank Building?

Answer "Yes" or "No"

ANSWER: Yes

If you have answered the above Special Issue No. 2 "Yes", and in that event only, then answer Special Issue No. 3.

SPECIAL ISSUE NO. 3:

Do you find from a preponderance of the evidence that the Defendant Local Union 100 by and through its business manager, Cleo Lanham, thereafter refused to accept the Plaintiff's clearance card from his local union in Shreveport, Louisiana?

Answer "Yes" or "No"

ANSWER: NO.

If you have answered the above Special Issue No. 3 "Yes" and in that event only, then answer Special Issue No. 4:

SPECIAL ISSUE NO. 4:

Do you find from a preponderance of the evidence that in refusing such clearance card of Plaintiff, (if you have so found), that the said Cleo Lanham did in his capacity as

Business Manager of Defendant Local Union 100 act wilfully, as that term is herein defined?

Answer "Yes" or "No"

ANSWER
(NOT ANSWERED)

SPECIAL ISSUE NO. 5:

Do you find from a preponderance of the evidence that the said Defendant Local Union 100, acting by and through Cleo Lanham, wilfully refused to let the Plaintiff work on said Republic National Bank Building?

Answer "Yes" or "No"

ANSWER: Yes

If you have answered the above Special Issue No. 5 "Yes", and in that event only, then answer Special Issues Nos. 6 and 7.

SPECIAL ISSUE NO. 6:

Do you find from a preponderance of the evidence that such refusal, if any, was made at a time when said Cleo Lanham knew, if he did, that under the rules of said Local Union, if any, the Plaintiff was entitled to work on said Bank Building?

Answer "Yes" or "No"

ANSWER: Yes

SPECIAL ISSUE NO. 7:

Do you find from a preponderance of the evidence that such refusal to let the Plaintiff work on said Republic

National Bank Building, if you have so found, was without any cause or reason whatsoever?

Answer "Yes" or "No"

ANSWER: No.

SPECIAL ISSUE NO. 8:

Do you find from a preponderance of the evidence that with full knowledge of the conduct of Cleo Lanham, if any, concerning Plaintiff, the officers and members of the said defendant Local Union 100 approved such conduct?

Answer "Yes" Or "No"

ANSWER: Yes

SPECIAL ISSUE NO. 9:

What sum of money, if any, do you find from a preponderance of the evidence that the Plaintiff would have earned if he had been allowed to work on the Republic National Bank Building during the time from September 15, 1953 to September 15, 1954?

Answer as to the amount in dollars and cents, if any; otherwise, let your answer be "None".

ANSWER: $5,856.00

SPECIAL ISSUE NO. 10:

What sum of money do you find from a preponderance of the evidence that the Plaintiff did earn, or by the use of reasonable diligence could have earned, during the same

period of time from September 15, 1953 to September 15, 1954?

Answer as to the amount in dollars and cents.

ANSWER: $3,940.00

SPECIAL ISSUE NO. 11:

Do you find from a preponderance of the evidence that the Plaintiff, by being denied the job opportunity on the Republic National Bank project by Defendant, Local Union 100, if you have so found that he was denied such job opportunity, suffered any mental anguish?

Answer "Yes" or "No"

ANSWER: Yes

If you have answered Special Issue No. 11 "Yes", and only in that event, you will answer the following Special Issue; otherwise you need not answer same.

SPECIAL ISSUE NO. 12:

Do you find from a preponderance of the evidence that said Defendant's denial of the job opportunity to Plaintiff in the Republic National Bank project, if you have so found that Defendant did deny Plaintiff such job opportunity, was a proximate cause of Plaintiff's suffering mental anguish, if any?

Answer "Yes" or "No"

ANSWER: Yes

In connection with the above Special Issue No. 12, you are instructed that by the term "Proximate Cause" is meant that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produces an event, and without which the event would not have occurred; and to be a proximate cause of an event it should be such as that it could have been reasonably anticipated and foreseen by a person of ordinary prudence in the exercise of ordinary care that the event, or some similar event, would have resulted from such cause as a natural and probable consequence, in the light of the attending circumstances.

If you have answered the above Special Issue No. 12 "Yes", and in that event only, then answer Special Issue No. 13.

SPECIAL ISSUE NO. 13

What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate the Plaintiff for the mental anguish, if any, suffered by him by virtue of being denied the work to work on the Republic National Bank project by Defendant Local Union 100, if you have so found that he was denied such job opportunity?

Answer as to the amount, if any, in dollars and cents; otherwise let your answer be "None".

ANSWER: $1,500.

SPECIAL ISSUE NO. 14:

From a preponderance of the evidence, what sum of money, if any, do you award the Plaintiff against the

Defendant Local Union 100 as punitive damages, if any?

Answer as to the amount, if any, in dollars and cents; otherwise let your answer be "None".

ANSWER: $5,000.00.

In connection with the above Special Issue No. 14, you are instructed that by the term "punitive damages" is meant damages which are assessed against the Defendant for the purpose of punishing it and also for the purpose of setting a wholesome example, if any, to others.

SPECIAL ISSUE NO. 15:

Do you find from a preponderance of the evidence that after having been refused the opportunity to work on said Republic National Bank Building, if he was, the Plaintiff failed to pursue his grievance, if any, within the rules and procedures of said Local Union 100 that were available to him, if any were available?

Answer "He did fail" or "He did not fail"

ANSWER: He did fail.

SPECIAL ISSUE NO. 16:

Do you find from a preponderance of the evidence that in October, 1953, the Plaintiff voluntarily accepted work upon referral from Defendant without any complaint?

Answer "Yes" or "No"

ANSWER: Yes

If you have answered Special Issue No. 16 "Yes" and in that event only, then answer Special Issue No. 17.

SPECIAL ISSUE NO. 17:

Do you find from a preponderance of the evidence that the Plaintiff acquiesced in Defendant Local Union 100's actions?

Answer "Yes" or "No"

answer "No

By the term "Acquiesce" as used in the foregoing issue, you are instructed that it means a voluntary acceptance or consent by remaining silent or omitting to object. If you have answered the above and foregoing Special Issue No. 17 "Yes" and in that event only, then answer Special Issue No. 18.

SPECIAL ISSUE NO. 18:

Do you find from a preponderance of the evidence that the said Defendant relied upon the Plaintiff's acquiescence, if any, to its detriment?

Answer "Yes" or "No"

ANSWER:
(Not Answered)

SPECIAL ISSUE NO. 19:

Do you find from a preponderance of the evidence that the Plaintiff failed to apprise the Defendant Local Union 100 of his complaints?

Answer "Yes" or "no"

ANSWER: No.

If you have answered the above Special Issue No. 19 "Yes" then in that event only, answer Special Issue No. 20.

SPECIAL ISSUE NO. 20:

Do you find from a preponderance of the evidence that such failure, if you have so found, amounted to inexcusable neglect?

Answer "Yes" or "No"

ANSWER:
(NOT ANSWERED)

In connection with the above and foregoing Special Issue No. 20, you are instructed that by the term "inexcusable neglect" is meant such delay as a reasonably prudent person would in no event have exercised under the same or similar circumstances. If you have answered the foregoing Special Issue No. 20 "Yes" and in that event only, then answer Special Issue No. 21.

SPECIAL ISSUE NO. 21:

Do you find from a preponderance of the evidence that such inexcusable neglect, if any, worked a disadvantage to the Defendant, Local Union 100?

Answer "Yes" or "No"

ANSWER:
(NOT ANSWERED)

SPECIAL ISSUE NO. 22:

Do you find from a preponderance of the evidence that it would have been useless for Plaintiff to have pursued his

complaint, if any, within the rules and procedures, if any, of said Defendant Local Union 100?

Answer "Yes" or "No"

ANSWER: Yes

After you retire to your jury room, you should select one of your members as your "Foremen". It is his duty:

1. To preside during your deliberations,

2. To see that your deliberations are conducted with propriety,

3. Communicate with the Court *IN WRITING* on any matter requiring further instruction or assistance,

4. Vote with you upon each issue,

5. Write your answers to the issues in the spaces provided; and

6. To certify to your verdict in the certificate attached to this page.

Your answers must be by unanimous vote. In voting upon your answers, you may do so orally, in writing, by show of the hands, or in any other fair manner convenient to you; but you must not reach a verdict by lot, chance nor trading upon your answers.

After you have retired to consider your verdict, no one has any authority to communicate with you except the officer who has you in charge, and he can only inquire if you have agreed upon a verdict.

When you have answered all of the foregoing questions as requested, and your Foreman has placed your answers in the spaces provided, you will advise the officer in charge at the door of the jury room that you have reached a verdict, whereupon you will return into court with your verdict.

A. R. STOUT /S/
JUDGE PRESIDING. Judge of
40th Judicial District
Sitting for Judge of 101st
Judicial District.

WE, THE JURY, HAVE ANSWERED THE ABOVE AND FOREGOING SPECIAL ISSUES AS HEREIN INDICATED, AND HEREWITH RETURN THEM INTO COURT AS OUR VERDICT.

/s/ CLARE G. WEAKLEY, JR.
FOREMAN.

(And the following communication and answer of the Court)

I have received your communication reading as follows: "Issue #7

Does 'without any cause or reason' mean without any reason whatsoever (personal or otherwise) or does it mean without reason according to the union by laws?

Clare G. Weakley, Jr.
Foreman

in answer to such communication, you are instructed that:

It means a cause or reason which was actuated by an intent that was not in good faith. A denial, even though errone-

ous, which resulted merely from negligence, inadvertence or mistake would not be without any cause or reason whatsoever.

/s/ A. R. STOUT
Judge Presiding

Which findings were received by the Court and were filed and entered of record on the Minutes of such Court.

And the Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada having filed its Motion for Summary Judgment and having presented the same to the Court prior to the commencement of the trial of this cause, and the Court having carried the said Motion along until such time as all of the evidence was adduced by both Plaintiff and Defendant, and the Court being of the opinion that the said Motion should be in all things overruled, said Motion of Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada is hereby in all things overruled.

Whereupon Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada filed its Motion for Judgment on the Verdict of the Jury, and in the alternative for Judgment non obstante veredicto, and Plaintiff made his Motion for the Court to disregard certain Special Issue jury findings and for Judgment based upon the remainder of the verdict of the jury and, after

reasonable notice thereof, all parties appeared by their respective attorneys. The Court having heard and considered said Motions and being of the opinion that the Motion of Plaintiff should be granted (except as herein limited) and that the Motions of Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada should be overruled:

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the Motions by Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada be and the same are in all things overruled, and the Motion filed by Plaintiff to disregard certain Special Issue Jury findings (being particularly Special Issue No. 7, which is not a controlling issue) and to enter judgment on the remainder of the jury verdict is hereby granted as hereinafter limited and stated:

And the Court having considered the verdict, and being of the opinion that Plaintiff is not entitled to recover any sum for mental anguish in a suit of this type and that such issue was not raised by the law and the evidence and should not have been submitted, and being further of the opinion that the punitive damages found by the jury are unjust and excessive under the facts and that the plaintiff should be required to remit to the extent that such punitive damages not exceed the actual damages awarded, to which said Plaintiff has agreed and does remit and assent subject to its right to

complain in the event of an appeal by the said defendant, the court is therefore of the opinion that judgment should be rendered for the Plaintiff as follows:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff H. N. Borden do have and recover of and from Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada the sum of Three Thousand Eight Hundred Thirty-two Dollars ($3,832.00), together with interest thereon at the rate of Six (6) per cent per annum from this date until paid, and all costs of suit, for which let execution issue.

To which action and judgment of the Court in first, overruling its Motion for Summary Judgment and for Judgment on the Verdict of the Jury and in the alternative its Motion for Judgment non obstante veredicto, and, second, in sustaining the Motion of Plaintiff to disregard certain Special Issue jury findings and for judgment on the remainder of said jury verdict, and in entering this Judgment, Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, then and there in open court excepted.

And to which action of the Court in first refusing to allow him any sum for mental anguish when, in response to the Special Issue inquiry as to mental anguish the jury answered $1,500.00; and second in granting the Motion for Directed Verdict of Defendant United Association of Journeymen and

Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plaintiff then and there in open court excepted.

SIGNED AND ENTERED THIS 3rd day of October, 1960.

A. R. Stout /s/
JUDGE PRESIDING
JUDGE 40TH JUDICIAL DISTRICT COURT SITTING FOR JUDGE 101ST JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

APPROVED AS TO FORM:

MULLINAX, WELLS, MORRIS & MAUZY
Attorneys for Defendants
By: L. N. D. Wells, Jr. /s/

LYNE, BLANCHETTE, SMITH & SHELTON
Attorneys for Plaintiff
By: Robert W. Smith /s/

ENDORSEMENT ON INSTRUMENT No. 2803
H. N. Borden vs. United Association of Journeymen et al
JUDGMENT
Recorded: Vol. LL, Page 415
In the Minutes of the 101st Judicial District Court

APPENDIX D

Excerpts from Record of Defendant's Pleadings Indicating Proper and Timely Raising of Federal Question

EXCERPT FROM ORIGINAL ANSWER OF LOCAL UNION 100, filed Sept. 24, 1955

The matters of which plaintiff complains are matters within the exclusive jurisdiction of the National Labor Relations Board pursuant to the Federal Labor Management Relations Act of 1947 (Taft-Hartley), which statute provides in pertinent part that it is an unfair labor practice for a labor organization or its agents:

> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *"

The cited federal legislation pre-empts this field and deprives this Honorable Court of the State of Texas of jurisdiction to hear and determine the matters alleged in plaintiff's petition for the reason that exclusive jurisdiction of said matters are, by the federal statute, lodged in the federal administrative agency and the federal court, and plaintiff has wholly failed to seek, utilize, or exhaust remedies available before the federal agency and federal court under the federal law.

WHEREFORE, defendant local union 100 respectfully prays that this Plea in Abatement be granted and that this suit be in all things abated and dismissed as to this defendant, and for such other relief as to which this defendant may be entitled.

EXCERPT FROM FIRST AMENDED ANSWER OF DEFENDANT LOCAL UNION 100

filed July 6, 1960 (Tr. p. 22)

Pleading further, defendant would show that the construction of the Republic Bank Building affected interstate commerce, and that union's activities in connection therewith affected interstate commerce; that by the federal Labor Management Relations Act of 1947, as amended, (Taft-Hartley), the Federal Congress has pre-empted to Federal tribunals the jurisdiction of the matters alleged in plaintiff's amended petition to the exclusion of the jurisdiction of the courts of the State of Texas.

EXCERPT FROM MOTION FOR NEW TRIAL OF DEFENDANT LOCAL UNION 100

filed Oct. 13, 1960 (Tr. 141)

The Court erred in overruling defendant's plea to the Court's jurisdiction that the subject matter of this suit is preempted by federal law to the exclusive jurisdiction of federal tribunals.

APPENDIX E

Pertinent Constitutional and Statutory Provisions

UNITED STATES CONSTITUTION

ARTICLE VI.

Clause 2.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Labor-Management Relations Act, 1947

29 U.S.C., Sec. 152—Definitions

Sec. 2. When used in this Act—

* * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting

in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

29 U.S.C. Sec. 158. Unfair Labor Practices

29 U.S.C. 158(a). "It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

29 U.S.C. 158(b) "It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

29 U.S.C. Sec. 160. Prevention of Unfair Labor Practices

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may in-

volve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

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No. 541

In the

Supreme Court of the United States

OCTOBER TERM, 1962

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES,

Petitioner,

v.

H. N. BORDEN,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR PETITIONER

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No. 541

In the

Supreme Court of the United States

OCTOBER TERM, 1962

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES,

Petitioner,

v.

H. N. BORDEN,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, rendered February 9, 1962, affirming damage judgment against petitioner (R. 348) is reported at 355 S. W. 2d 729.

Earlier opinions and orders of the Texas courts in this case are also contained in the record, viz:

Unreported order of the District Court of Dallas County, Texas, rendered February 15, 1957, sustaining jurisdictional pre-emption plea and dismissing the suit, R. 16.

Unreported opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, rendered April 11, 1958, affirming dismissal, R. 17.

Opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, rendered July 25, 1958, reported at 316 S. W. 2d 458, withdrawing its opinion of April 11, 1958, and remanding for trial on the merits, R. 22.

Opinion of the Supreme Court of Texas, 160 Tex. 203; 328 S. W. 2d 739, rendered November 4, 1959, affirming remand for trial on the merits, R. 26.

Judgment of the District Court of Dallas County, Texas, entered October 3, 1960, awarding respondent Borden damages against petitioner, Local 100, R. 60-72.

JURISDICTION

The judgment of the Court of Civil Appeals for the Fifth Judicial District of Texas was entered on February 9, 1962, R. 348.

The Supreme Court of Texas refused timely application for Writ of Error on July 25, 1962 (R. 361) making final the decision of the Court of Civil Appeals.

A petition for writ of certiorari was granted on December 17, 1962 (R. 362). The jurisdiction of this Court is invoked under 62 Stat. 922(3), 28 U.S.C., §1257(3).

QUESTION PRESENTED

Does a state court have jurisdiction to award compensatory and punitive damages against a labor union for its refusal to issue a job referral to a member, which refusal resulted in denial of employment by an employer whose operations affect interstate commerce? Is such conduct by a labor union "potentially subject to the exclusive federal regulatory scheme" expressed in the Labor Management Relations Act of 1947, and thus limited to the exclusive jurisdiction of federal tribunals under the federal Act?

STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C., 141 et seq.), are set forth in Appendix, *infra*, pp. 43-54.

The provisions of *Article 5207-A, Tex. Rev. Civ. Stat., Article 5154 and 5154g, Tex. Rev. Civ. Stat.* are set forth in Appendix, *infra*, pp. 55-58.

STATEMENT

The Texas Courts have denied pleas of federal pre-emption and have awarded compensatory and punitive damages to H. N. Borden against his local union for its refusal to "refer" him to work on a construction project which affected interstate commerce.

A. The State Court Pleadings

Borden's pleadings in the state court (R. 10-15) alleged his membership in defendant union, and its parent Inter-

national,[1] complained of the union's denial of Borden's rights of membership, i.e. the refusal to accept his "clearance card" from a sister local,[2] and the refusal of the business agent to issue him a referral to work for the Farwell Construction Company on the construction of the Republic National Bank Building,[3] which employment Farwell's foreman had offered him, subject to obtaining union referral.[4] Borden alleged that these acts of the union business agent Lanham were ratified by Local 100, that the deprivation of employment on the Republic Bank construction caused loss of earnings in a specified amount, and sought actual and punitive damages, as well as compensation for "mental anguish" (R. 10-15).

The union challenged the state court's jurisdiction, asserting that the subject matter of the suit was within the exclusive jurisdiction of the NLRB pursuant to the Labor Management Relations Act of 1947, *61 Stat. 136; 29 U.S.C. §141 et seq.* (R. 6).

B. The Rulings in the Texas Courts

The trial court initially sustained the plea to the jurisdiction and dismissed the suit, holding "that jurisdiction of a

---

[1] The suit was against both Local 100, and its parent International, the United Association. The latter went out of the case by directed verdict, R. 60.

[2] Amended Petition, ¶VII, R. 12. Refusal to accept "clearance" would have meant denial of membership in Local 100 (and a diminution of membership rights in the International). Under Borden's reading of *Gonzales* this is sufficient to base state court jurisdiction. There are two difficulties with Borden's position here: (1) the jury found that there was no denial of clearance; (2) moreover, even if there had been, any refusal of referral based thereon it remains at the core of the Federal regulatory scheme, and is not subject to state jurisdiction, see pp. 14-25, *infra*.

[3] Id., ¶VIII, IX, R. 12.

[4] Id., ¶VI. The Plaintiff's trial amendment (R. 57-59) is even more specific in complaint that the union "refused to * * * refer him (Borden) out to work * * *" R. 58.

suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the exclusive jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, and accordingly this [state] court is without jurisdiction" (R. 16).

The Texas Court of Civil Appeals affirmed the dismissal in an unreported opinion (R. 17-22), holding "* * * the matters involved in this action are, in our opinion within the coverage of the Labor Management Relations Act" (R. 21).

Before the appellate court's opinion became final, and while the case was pending there on Borden's application for rehearing, the Supreme Court of the United States decided *International Ass'n. of Machinists v. Gonzales, 356 U. S. 617.*

The Texas Court of Civil Appeals thereupon withdrew its earlier opinion, substituted an opinion reported at *316 S. W. 2d 458*, citing *Gonzales*, and holding "that the state court has jurisdiction of appellant's suit." *316 S. W. 2d 458 at 461* (R. 22 at 26), and remanded for trial on the merits.

The Supreme Court of Texas granted writ of error on another point, and in an opinion (which does not treat of the jurisdictional issue) affirmed the Court of Civil Appeals and remanded the case for jury trial. *160 Tex. 203; 328 S. W. 2d 739* (R. 26-48), holding:

"[Borden's] allegations will support proof that respondent was wilfully denied a job opportunity to

[3] On remand the jurisdictional federal pre-emption point was again presented by plea to the jurisdiction in the amended answer of the union (R. 55), and by motion for new trial (R. 73), and overruled in both instances (R. 56, 70).

> which Lanham knew he was entitled under the rules and procedures established by petitioners for allocating work among its members, and that petitioners either conspired with Lanham to bring this about or otherwise authorized or ratified his wrongful conduct. If these are the facts * * * respondent is entitled to maintain this suit against petitioners." (R. 34).

On trial to a jury a special issue verdict was returned (R. 62-68) which found, insofar as here pertinent, that Borden was promised a job (conditioned on union referral) on the construction of the Republic Bank Building;[6] that employer requested the union to refer Borden to this job;[7] that union refused to refer Borden to this job,[8] though under the rules of the union the business agent knew plaintiff was entitled to referral,[9] that the refusal of referral was ratified by the local union,[10] that plaintiff suffered actual damage in the amount of $1,916.00 for what he "would have earned, had he been allowed to work on the Republic National Bank Building" less his interim earnings elsewhere.[11] There were also findings of $1,500.00 for mental anguish, and punitive damage of $5,000.00.[12]

Note that the jury found against Borden on his claim of denial of membership rights; i.e. by Special Issue No. 3 the jury found that the local union did not refuse to accept Borden's "clearance card" (R. 63).

---

[6]Special Issue No. 1 (R. 62). It is undisputed that the job offer was conditioned on Borden's obtaining a union referral (R. 351; 144).

[7]Special Issue No. 2, R. 62-63.

[8]Special Issue No. 5, R. 63.

[9]Special Issue No. 6, R. 64.

[10]Special Issue No. 8, R. 64.

[11]Special Issues No. 9-10, R. 64-65.

[12]Special Issues No. 11, 12, 13, 14; R. 65-66.

The trial court's judgment (R. 60ff) excised the award for mental anguish (R. 71), reduced the punitive damages to an amount equal to the actual damage, and awarded actual and punitive damages in the sum of $3,832.00 (R. 71).

The Court of Civil Appeals affirmed, *355 S. W. 2d 729* (R. 348-360), again relying on *Gonzales*, it held (R. 350, 351):

> "Appellant again asserts exclusive application of 29 U.S.C.A. § 151, et seq., (Taft-Hartley Act to this lawsuit).
>
> * * * * *
>
> "The suit of Borden as already stated was based on both contract and tort. Even if Borden be considered an employee, which appellee denies, Farwell Construction Company, the contractor and employer, was not a party to the suit and there is no evidence that it practiced any discrimination against Borden or treated him anywise different from other employees. He was simply offered a job and requested to obtain a referral from Local Union 100 as were all other employees of Farwell. By plain wording of the Act, the discrimination must be limited to purpose of encouragement or discouragement of membership in the union and plaintiff was already a member. This is a suit for wrongs allegedly committed against plaintiff by arbitrary conduct of Local Union 100; and as held in International Association of Machinists v. Gonzales * * * the Labor Management and Relations Act does not displace state court jurisdiction over suits to determine and enforce rights of union members in their union."

Union's application for writ of error to the Supreme Court of Texas, asserting the pre-emption point was denied without opinion (R. 361). The United States Supreme Court granted certiorari on December 17, 1962 (R. 362).

C. The Referral System as Applied to Borden

Borden, a member of the Shreveport, Louisiana, local of the plumbers union, came to Dallas in September of 1953 seeking employment by Farwell Construction Co. in the construction of the Republic National Bank (R. 57-58). Borden transferred his membership to Local 100 of Dallas by depositing his "clearance card" with the local (R. 98-99).

Sharply conflicting testimony on many points has been resolved by the Texas courts to establish that Borden was not denied rights of union membership by refusal to "clear him in" to the Dallas local union.

Similarly conflicting testimony has been resolved by the Texas courts to establish that Borden was refused a job referral necessary for him to obtain employment at the Republic Bank construction which had been promised him on the condition that he obtain the referral. The Texas court specifically found that Borden was offered a job on the Republic Bank project by the Farwell foreman and "requested to obtain a referral from Local Union 100 as were all other employees of Farwell" (R. 351). Borden's request for referral was refused by the union business agent (R. 83, 85, 352). The Farwell foreman's follow-up request was also refused (R. 145, 353).

While the collective bargaining agreement between the local union and the Dallas employers (including Farwell) did not contain specific provision requiring union referral (Pl. Ex. 8; R. 187, 273, 344), it was the union custom "that once a request is made by an employer for a specific employee,

that person is immediately referred to the job site" (R. 354). Moreover, all the hiring by Farwell at the Republic Bank job was through union referral (R. 345; 142ff., 152, 214).

The Court below found that refusal of union referral resulted in Borden's failure to obtain the desired employment on the Republic Bank job.[13]

The union By-laws in effect at the time (Pl. Ex. 6; R. 273, 327) provided "Members shall not solicit work from any contractor or their (sic) representative. All employment must be procured through Business Office of Local Union No. 100 * * *."

While no specific jury finding was made as to the cause of the refusal of Borden's referral, Borden testified that union business agent Lanham told him (R. 84):

> "You are not going to work down there on the bank job or for Farwell, you have come in here wrong, you have come in here with a job in your pocket."[14]

The record admits four possible reasons for the refusal of referral; (1) that Borden had violated the cited union rule prohibiting individual solicitation of employment; (2) that the local union followed a policy of discrimination in favor

[13]Defendant's Point 3 on appeal to the Court of Civil Appeals was: "the denial by Lanham of a referral was not the cause for Borden's failure to obtain employment at the bank site." (R. 351.) The Court disposed of this point: "With respect to point three, the referral of plaintiff to the bank site for work at request of Thurman was in accordance with above union custom, refused by Lanham, with resulting injury to plaintiff" (R. 354).

[14]The Court of Civil Appeals noted, similarly, that at a general membership meeting of the union it was stated "that Borden was not referred to the bank site because "he came in here wrong" and would not be allowed to work there (R. 218, 353, 355).

Borden explained that "job in your pocket" could mean that he had been working for Farwell in another city and "was coming in here [Dallas] to still continue to work for the company" (R. 84).

of Dallas members, and against those who "clear in" from other locals;[15] (3) that the refusal of referral resulted from the business agent's caprice, unrelated to union obligation or membership; or (4) that Borden's error—"coming in wrong" related not to an internal union rule, but rather to the hiring hall or referral arrangement prevailing between employer Farwell and Local 100.[16]

Borden concedes that he utilized the union referral system, that the local union did refer him to work on numerous other jobs. Borden's sole complaint was the business agent's refusal to refer him to the Republic job (R. 353; 100, 102, 104).

The union referral system, in the operation of which Borden claims discrimination, is a traditional institution, valuable both to employers and employees, particularly in the building, maritime and other seasonal trades where employment is short lived or sporadic.[17] The referral system offers employers in such industries a reservoir of skilled labor, available on short notice; and offers workers access to jobs

[15]This explanation comports with Borden's attorney's theory of the suit; for he asserted that the local had a policy of refusing referral to out of town members who were in the Local by virtue of clearance cards (R. 194-195).

There is some evidence to support this theory, for the Farwell foreman testified that when he called the local requesting Borden's referral:

> "I asked Mr. Lanham if he had an H. N. Borden there and he said he did, and I said, 'Well, if you give him a referral, send him down to this bank. * * *' He said, 'I am not about to send that old (S.O.B.) down there, he shoved his card down our throat and I am not about to send him to the bank.' " (R. 145, 353.)

[16]Cf. R. 354; 87ff., 142ff., 152, 214, 226, 303.

[17]Senate Report No. 1827, 81st Cong. 2nd Sess., pp. 4-8; Fenton, Union Hiring Halls under the Taft-Hartley Act, 9 Lab. L. Jour. 505 at 507 (1958). (Cf. R. 153).

through a central dispatch.[18] While the social values of the referral systems are well recognized;[19] abuses of the system have given rise to a large body of federal law, whereby the values of the system to both industry and labor are sought to be preserved, while the discriminations sometimes arising in its operation are proscribed.[20]

In the instant case, the state court, on sharply disputed testimony, has found discrimination *vis-a-vis* Borden in the operation of the referral system, and has applied the state's notions as to the proper remedy therefor. This case thus tests the power of state tribunals to regulate hiring systems which affect interstate commerce,[21] and are the subject of federal legislation and a large body of federal law fashioned by the agency to which Congress has committed such regulation.

SUMMARY OF ARGUMENT

(1) The facts found by the state court disclose conduct subject to exclusive federal regulation, either as unfair labor practices proscribed by Sections 8(b)(1)(A) and 8(b)(2) of the Labor Management Relations Act, or privileged under

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[18] See *Teamsters Local 357 v. NLRB, 365 U.S. 667 at 672, 673;* Cf. R. 153.

[19] See views of Senator Taft, S. Rep. No. 1827, 81st Cong., 2d Sess., pp. 13-14.

[20] This very local union has been subjected to NLRB order, 128 NLRB 398, enforced by the Circuit Court, 291 F. 2d 927 (C.A. 5, 1961), on NLRB finding that one Breland "was unable to start working because his employment had been conditioned upon his obtaining a work order or clearance from the union and that he had been unable to secure the necessary order. *Local 100, Plumbers, 128 N.L.R.B. 398, 399 (1960).*

[21] It is stipulated that in the construction of the Republic Bank, at which Borden sought employment, employer Farwell purchased materials having a value of over half a million dollars, which materials were transported in interstate commerce. (R. 273-274.)

that statute. The terms of the federal statute, its legislative history, and its application by federal tribunals all demonstrate that refusal of referral such as here affected Borden is the prototype of the conduct encompassed within the federal orbit. *Radio Officers Union v. NLRB, 347 U. S. 17 (1954).*

Depending upon the reasons to be ascribed to the refusal of referral, the refusal is either proscribed or privileged under the federal Act.

(2) With respect to labor activity subject to Sec. 7 or Sec. 8 of the federal Act the states must defer to the exclusive competence of NLRB to avert the danger of state interference with national policy. "Even the states' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities potentially subject to the exclusive federal regulatory scheme," *San Diego Bldg. Trades v. Garmon, 359 U. S. 236 (1959).*

(3) While *International Association of Machinists v. Gonzales, 356 U. S. 617 (1958)*, carves a limited exception in the law of federal pre-emption, it does not permit the exercise of state jurisdiction in the instant case, for the cases are distinguishable on the facts. Both the majority and the dissent in *Gonzales* recognize that such complaints as Borden's are for exclusive federal determination. For as the majority noted: "The [Gonzales] suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the [federal] Board is concerned to strike at as an

unfair labor practice under Sec. 8(b)(2)," *356 U. S. at 622*; and "The state court proceedings [in Gonzales] deal with arbitrariness and misconduct vis-a-vis the individual union member and the union; the Board proceedings, looking principally to the *nexus between union action and employer discrimination* * * *." *356 U. S. at 622, 623* (Emphasis added).

This is the sole nexus upon which Borden's state court recovery is predicated: union refusal to refer, causing employer refusal to hire, thus central to the administration of the federal Act. Clearly, then, the Texas courts have misconstrued and misapplied *Gonzales*.

(4) *Gonzales*, if construed to permit state courts to determine a state's jurisdiction to control referral systems, hiring halls and employment practices should be reexamined for, since *Gonzales*, state courts hostile to the federal regulatory scheme have regulated employee-union controversies in a manner inconsistent with the federal policy.

(5) Finally, there is no compelling state interest to justify state intrusion in hiring practices subject to federal regulation. As the Congress has recognized, control of hiring practices affecting interstate commerce requires a balancing of the public interest against private harm. This, in turn, requires formulation of a uniform policy administered through the expertise of an agency, conversant with the intricate problems of labor economics, to vindicate the public interest in the functioning of traditional employment institutions.

ARGUMENT

1.

The union conduct at issue is within the Federal Statute.

The conduct which the state here regulates is within the complex regulatory scheme of the federal Act. Borden's suit challenges the operation of a union hiring hall and job referral system. His sole basis of recovery is the refusal of a job referral required by Farwell as a prerequisite of employment (R. 354).[22] The Texas state courts thus have determined, by state standards, the propriety of conduct which is continually being tested by the NLRB under Sections 8(b)(1)(A) and (2) of the federal Act.

Congress has determined, *29 U. S. C., §141 et seq.; at §158:*

> "Section 8(b) It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7; Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *
>
> "Section 8(a) It shall be an unfair labor practice for an employer— * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *"

[22]His "damages" are computed in the state court in the amount he "would have earned, had he been allowed to work on the Republic National Bank Building." See Special Issue #9, R. 64.

The very words of the statute make clear the application to the instant case. Moreover, the legislative history which this court set out in the *Mountain Pacific* case, *Teamsters Local 357 v. NLRB, 365 U. S. 667 (1961)*, emphasizes the intent of the framers of the federal Act to regulate this conduct. Thus, since the Taft-Hartley amendments in 1947 the NLRB, the federal Courts of Appeals[23] and this Court have built a large body of federal case law by which allegations of discrimination in operation of referral systems are to be, and are being tested.

Without attempting to detail the numerous NLRB decisions testing the legality of union referral procedures and hiring hall practices,[24] the frequency of the occurrence of the question can be demonstrated by a statement contained in a recent Annual Report of the NLRB:

> "As in prior years, a substantial number of the cases against unions arose from complaints alleging con-

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[23] *NLRB v. Penobscot Bay Longshoremen, 310 F. 2d 689 (C.A. 1, 1962); NLRB v. Local 340, Electrical Workers, 301 F. 2d 824 (C.A. 9, 1962); NLRB v. Local 392, Plumbers, 277 F. 2d 56 (C.A. 7, 1960); NLRB v. Local 542, Operating Engineers, 255 F. 2d 703 (C.A. 3, 1958); NLRB v. Local 1423, Carpenters, 238 F. 2d 832 (C.A. 5, 1956); NLRB v. Philadelphia Iron Works, 211 F. 2d 937 (C.A. 3, 1953); cf. NLRB v. Local 419, Painters, 242 F. 2d 477 (C.A. 10, 1957); NLRB v. Local 420, Plumbers, 239 F. 2d 327 (C.A. 3, 1956); NLRB v. Jarka Corp., 198 F. 2d 618 (C.A. 3, 1952).*

[24] For example, the Bureau of National Affairs Labor Reporter Service digests some 100 NLRB decisions from 1948-1960 under the headnote "Hiring Halls; Referral Practices; Preferential Hiring Contracts." Bureau of National Affairs, Inc., *Labor Relations Cumulative Digest and Index 1948-1960*, Vol. II, §59.154.

The reported decisions of the NLRB represent only a small portion of the total cases processed. For example, during fiscal year 1961 of the 2,556 unfair labor practice cases against unions that were closed, 82% were disposed of before issuance of formal complaint. Twenty-Sixth Annual Report of the National Labor Relations Board, p. 226 (Table 7), (1962). The same report reflects that 1958 unfair labor practice charges alleging 8(b)(2) violations by unions were filed during fiscal 1961. *Id.* at 220 (Table 2).

> tractual or informal arrangements under which the participating employer was to give preferential treatment to the union's members, or the union was to have control over such matters as hiring and seniority. The maintenance of agreements which in effect condition employment or employment benefits on union membership and compliance with union rules—other than as permitted by the act's union-security provisions—has consistently been held violative of the nondiscrimination provisions of Section 8(b)(2) and 8(a)(3) in that such arrangements inevitably encourage union membership * * *." *Twenty-Fifth Annual Report of the National Labor Relations Board*—at p. 90 (1961); see also *Twenty-Sixth Annual Report of the National Labor Relations Board* at p. 121 (1962).

This Court's opinion in *Radio Officers Union v. NLRB, 347 U. S. 17 (1954)*, analyzes the purpose of Sec. 8(b)(2) of the federal Act, viz:

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus, sections 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *347 U. S. at 40.*

Applying the *Radio Officer's* test to Borden's complaint, it seems evident that his is just that type complaint for which Sec. 8(b)(2) was provided. In fact the state court, in sustaining its common law cause of action, relied upon the same character of evidence that would have been appraised by the NLRB had it been presented *Borden's* case. However, the state court in analyzing 8(b)(2) missed the point, concluding that there was no evidence that the em-

ployer "practiced any discrimination against Borden or treated him anywise different from other employees. He was simply offered a job and requested to obtain a referral from Local Union 100, as were all other employees of Farwell" (R. 351).

On the face of the state court's findings "discrimination" within the meaning of 8(a)(3) was practiced by Farwell Construction, for as the Supreme Court noted in *Radio Officer's, 347 U. S. at 39*, on virtually identical facts:

> "Discrimination is not contested in these cases: involuntary reduction of seniority, *refusal to hire for an available job*, and disparate wage treatment are clearly discriminatory."[25] (Emphasis added.)

This discrimination against Borden resulted from Local 100's refusal to give Borden a referral.[26] For purpose of 8(b)(2) violation the question becomes whether the discrimination was for the purpose prohibited by 8(a)(3): "to encourage or discourage membership in any labor organization."

The Court below in distinguishing Section 8(b)(2) and 8(a)(3) concluded that the proscribed purpose of Section 8(a)(3) was not present:

> "By plain wording of the Act, the discrimination must be limited to purpose of encouragement or discourage-

[25] "Discrimination involves an intent to distinguish in the treatment of employees on the basis of union affiliation or activities, thereby encouraging or discouraging membership in a labor organization * * *."
Botany Worsted Mills, 4 NLRB, 300 (1937).

[26] As noted earlier (Note 13, *supra*) petitioner's third point of error on appeal had been the absence of a causal relation between the denial of referral and inability to obtain the desired employment. This point was overruled by the Court below, stating: "With respect to point three, the referral of plaintiff to the bank site for work at request of Thurman was in accordance with above union custom, refused by Lanham, with resulting injury to plaintiff" (R. 354).

ment of membership in the union and plaintiff was already a member" (R. 351).

Again, the facts of *Radio Officer's* are apposite. Fowler, a member of the union, was removed from a job at union insistence because of his failure to obtain prior union clearance to the job. His punishment was the same as Borden's —no union referrals to Bull Steamship but referrals to other companies. An independent 8(b)(2) ground was the subsequent refusal of the union to honor a company request for Fowler's referral, *347 U. S. at 52*.

The Supreme Court concluded discrimination was present:

> "The circumstances in Radio Officer's and Teamsters are nearly identical. In each case the employer discriminated upon the instigation of the union. The purposes of the union in causing such discrimination clearly were to encourage members to perform obligations or supposed obligations of membership * * *. Both Boston and Fowler were denied jobs by employers solely because of the union's actions. Since encouragement of union membership is obviously a natural and foreseeable consequence of any employer discrimination at the request of a union, these employers must be presumed to have intended such encouragement. It follows that it was imminently reasonable for the Board to infer encouragement of union membership."

The mere fact that Borden was already a union member does not eliminate the purpose proscribed by 8(a)(3). The state court opinion quotes testimony, ample in itself, to sustain an NLRB finding that the discrimination was for the purpose of encouraging union membership, or as the Supreme Court found in *Radio Officer's* "to encourage mem-

bers to perform obligations or supposed obligations of membership." *347 U. S. at 52.*

All we have said above relates to the showing of discrimination *within the federal statute on the basis of the findings set* out in the Texas Court's Opinion. If one looks behind those findings to the record testimony it is even more certain that the federal Act applies.

We have noted earlier (pp. 9-10, *supra*) that though no specific finding as to the reason for the refusal of Borden's referral was made, plaintiffs' own evidence permits of four possible reasons: (1) Borden's violation of a union rule prohibiting solicitation of employment outside the hiring hall; (2) union policy of favoring Dallas residents; (3) the caprice of the business agent; or (4) Borden's failure to comply with lawful hiring hall and referral procedures arranged between employer Farwell and Local 100.

Any one of the first three reasons would have made a violation of 8(b)(2) of the federal Act, while the fourth would have been privileged under NLRB decisions. We turn to a discussion of NLRB application of the federal statute in each of these four situations, viz:

(1) Refusal of referral to enforce an internal union rule violates the federal Act. According to Borden, when he requested referral to the Republic job he was told by the union business agent:

> "You are not going to work down there on the bank job or for Farwell, you have come in here wrong, you have come in here with a job in your pocket" (R. 84, 352).

The meaning is unmistakable: if Borden had "come in" properly (i.e., adhered to his union obligation) he would have received the necessary union referral.[27] Borden was not the only person who received the message, for at a union meeting the membership was advised that Borden "was not referred to the bank site because 'he comes in here wrong'." (R. 219, 353). The only reason given Borden for the refusal to refer was that he had done something "wrong"—even if he had in fact done nothing wrong the effect is the same—in the future Borden would know, if he wanted to work, to stay on the right side of the local union. On this factual analysis it would appear that Borden is a prototype § 8(b)(2) complaint. *Radio Officers Union v. NLRB, 347 U. S. 17 (1954); NLRB v. Philadelphia Iron Works, 211 F. 2d 937 (C.A. 3, 1954).*

(2) Another explanation was given the Farwell foreman when he called the Local requesting Borden's referral. He testified: "I asked Mr. Lanham if he had an H. N. Borden there and he said that he did, and I said, 'Well, if you give him a referral, send him down to this bank * * *.' He [Lanham] said, 'I am not about to send that old [S.O.B.] down there, he shoved his card down our throat and I am not about to send him to the bank'." (R. 145, 353).

This explanation comports with plaintiff's theory of the lawsuit, for plaintiff asserted that the Local had a policy of

[27] Apparently Borden's error was in soliciting and obtaining a job offer from a contractor without prior union clearance. (Borden testimony, R. 79, 80, 84.) Local 100's By-Laws provided "Members shall not solicit work from any contractor or their representative. All employment must be procured through business office of Local Union No. 100 * * *." (Pl. Ex. 6; R. 273, 329.)

refusing referral to out-of-town members who were in the Local by virtue of clearance cards (R. 194-195). Assuming the accuracy of this formulation, it too would constitute an 8(b)(2) violation. *NLRB v. Local 1423, Carpenters, 238 F. 2d 832 (C. A. 5, 1956); NLRB v. Local 340, Electrical Workers, 301 F. 2d 824 (C. A. 9, 1962).*

(3) Should we assume that Lanham's refusal to refer Borden was unrelated to union obligations or membership and was purely the caprice of Lanham, according to a recent NLRB Decision it would nevertheless constitute a violation of §8(b)(1)(A) and (2). In *Miranda Fuel Company, 140 NLRB No. 7 (December 21, 1962)*, the Board held that 8(b)(1)(A) is violated by a union "taking action against any employee upon *considerations*, or classifications which are irrelevant, invidious or unfair." (Emphasis added.) Similarly, the Board there found that 8(b)(2) was violated by a union which "for arbitrary or irrelevant reasons or upon the basis of an unfair classification * * * attempts to cause or does cause an employer to derogate the employment status of an employee."

The Board majority employed a particularly apposite example in its *Miranda* opinion to demonstrate its conception of such a violation; *140 NLRB at* :*

> "* * * Union Business Agent Smith, who operates a union hiring hall under an exclusive hiring hall arrangement, places union member or non-member Jones at the bottom of the referral list and causes his discharge or otherwise refuses to refer Jones, because Jones refuses to court Smith's daughter."

*The official NLRB report is not yet printed. The language appears at page 4 of the mimeographed slip opinion issued by the Board and at *51 LRRM 1586*.

The Board concluded that this would violate §8(b)(1) and (2) of the federal Act.

(4) As might be expected, the state court did not attempt to appraise the facts as they relate to hiring hall practices that are legitimate under Taft-Hartley. It is at least arguable that *if* Borden's error—coming in wrong—related not to an internal union rule but rather to a hiring hall agreement between Farwell and Local 100, the refusal to refer would not have constituted a violation of the Act. *Local 106, United Bro. Carpenters, 132 NLRB 1444 (1961); cf. Teamsters Local 357 v. NLRB, 365 U. S. 667 (1961).* The state court record does not develop the full terms of the hiring hall understanding between Local 100 and Farwell and this remains in the realm of speculation.

We have thus shown that the present record affords ample evidence to warrant finding an 8(b)(2) violation. Conversely, implicit in the record is the possibility that the NLRB, in developing the law of the hiring hall, might have found the conduct of Local 100 permissible under the Act. It is the very inability to be more precise as to the presence of a violation that demonstrates the dangers of state court intrusion.[28]

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[28] A recent law review article by the General Counsel of the NLRB is suggestive of the intricacies of the question. Rothman, *The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements*, 48 Va. L. Rev. 871 (1962). He concludes:

"While the precise limits of the proof necessary to establish violations in exclusive hiring hall situations can be determined only after considerably more decisions have issued implementing the Supreme Court's Local 357 opinion, the following general conclusions may be ventured at this time.

"1. Contracts and hiring arrangements will be found unlawful only if they actually call for a closed shop, or for preferential hir-

(Continued on Page 23)

The state court has assessed and found wanting certain union conduct—conduct being simply the "refusal to refer him [Borden] to a job offered him in the construction of the Republic Bank Building" (R. 348). This self-same union conduct—refusal of referral—has been of pre-eminent concern to the NLRB since 1947.[28] The NLRB through its own procedures, in the exercise of its expertise, has created a formidable body of law governing the operation of union hiring hall and referral procedures. Some of its efforts at regulation of the hiring hall have been ill-fated—e.g., its *Mountain Pacific* formula which was rejected by the Supreme Court in *Teamsters Local 357 v. NLRB*, *365 U. S. 667*. However abortive, this effort to create a comprehensive scheme for regulation of the union hiring hall demonstrates the significance of the hiring hall to the enforcement of Taft-Hartley.

FOOTNOTE 28—(Continued From Page 22)

ing, but not solely on the basis of a lack of safeguards of the *Mountain Pacific* type.

"2. If an employer refuses to employ an applicant or discharges an employee due to his union membership or non-membership or other protected activities, such action is still illegal. Also, a union violates the Act if, on the basis of such reasons, it refuses to refer an applicant under an exclusive hiring hall agreement or causes or attempts to cause an employee's discharge.

"3. The refusal to refer or employ an applicant, or the discharge or attempted discharge of an employee is not unlawful merely because it is due to the enforcement of an exclusive hiring hall arrangement which the applicant or employee has circumvented.

"4. This is true even in situations where an illegal contract exists or where the union maintains discriminatory conditions for registration on its referral list, so long as the refusal to refer or hire or the discharge or attempted discharge is not in itself discriminatory in the sense that the illegality in the contract or the discriminatory refusal to register an applicant is an operative factor of the refusal to refer or employ him or of his discharge or attempted discharge.

"5. However, an employee's non-compliance with legal referral provisions is not a valid union defense to discrimination charges where a union, for discriminatory reasons, deliberately misleads him into believing that he is not eligible for referral and is therefore the cause of his non-compliance with the referral requirement."

[28] *Supra*, p. 15 at note 24.

If Borden was wronged the NLRB could have provided complete vindication.* The NLRB back pay remedy uniformly applied in such cases, would have made him whole and the Board cease and desist order would have prevented further interference with his employment.[30]

The Board, however, does more than assuage private wrongs, for it may in appropriate cases issue broad cease and desist orders directed at a pattern of conduct. In the case at bar there is testimony that not only Farwell hired exclusively through Local 100 referral (R. 142, 143) but that such was the "custom" in the area (R. 214). There was also testimony indicating that only Local 100 members (on clearance card or regular members) were referred by the Local Union (R. 171). Had the NLRB been afforded the opportunity it may have found a pattern affecting the entire industry in the Dallas area. If so, it is not only the

*Borden, ignoring the NLRB, has filed an action in Louisiana against the plumbers local there (R. 119-122).

[30]Ironically, this same Local was the subject of such an order in a quite similar case, in which Breland, a member of Plumbers Local in another city, "was unable to start working because his employment had been conditioned upon his obtaining a work order or clearance from the respondent union and that he had been unable to secure the necessary order." *NLRB v. Local 100, Plumbers, Steamfitters, 291 F. 2d 927 (C.A. 5, 1961)* enforcing 128 NLRB 398 (1960). The Board Order, as enforced by the Circuit Court, required Local 100 to do the following: "Cease and desist from: (a) causing or attempting to cause Claude C. Beard, Sr., and Claude C. Beard, Jr., a partnership doing business as Beard Plumbing Company, its officers, agents, successors, or assigns, to discharge, refuse to hire, or otherwise discriminate against O. W. Breland in violation of Section 8(a)(3) of the Act. (b) in any like or related manner restraining or coercing employees of, or applicants for employment with, Beard Plumbing Company in the exercise of the rights guaranteed in Section 7 of the Act * * * (2) take the following affirmative action, which the Board finds will effectuate the policy of the Act. (a) make whole O. W. Breland for any loss of pay he may have suffered by reason of discrimination against him in the manner and extent set forth in the Section of the Intermediate Report entitled "The Remedy." In addition, the Local was required to post for 60 days notices containing the substance of the foregoing Board Order.

potential conflict that poses dangers, but also the inherent limitations of state courts to enforce the public interest expressed in LMRA. This brings us to a discussion of the law of preemption.

2.

Union conduct regulated by the Federal Labor Statute is not subject to State Jurisdiction.

This case is controlled by the broad formulation of federal pre-emption expressed in *San Diego Bldg. Trades v. Garmon, 356 U. S. 236 (1959)*, and does not fall within the limited exception recognized in *International Association of Machinists v. Gonzales, 356 U. S. 617 (1958)*.

In *Garmon* the Court expressed the test of pre-emption:

> "When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. *359 U.S. at 245.*
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> • • • • •
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> "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *359 U.S. at 247.*

Specification of the boundaries between state and federal jurisdiction over labor matters has long occupied this Court. The bulk of the litigation has involved questions of

state competence to affect union-employer controveries.[31] Equally important to the "exclusive federal regulatory scheme" is the §7 right[32] of an individual to determine the extent of his participation in concerted activities free from concern for his livelihood. As this Court noted in *Amalgamated Association v. Wisconsin Employment Relations Board, 340 U. S. 383, 390, N. 12 (1951):*

> "Section 7 of the Labor Management Relations Act not only guarantees the right of self-organization and the right to strike, but also guarantees to individual employees the (right to refrain from any or all such activities); at least in the absence of a union shop or similar contractual arrangement applicable to the individual. Since the N.L.R.B. was given jurisdiction to enforce the rights of the employees, it was clear that the Federal Act had occupied this field to the exclusion of state regulation. Plankinton [Plankinton Packing Corp. v. Wisconsin Board, 338 U.S. 953] and O'Brien [Auto Workers v. O'Brien, 339 U.S. 454] both show

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[31] *Laborers, Local 438 v. Curry, ... U. S. , 9 L. Ed. 2d 514; Ex Parte George, U. S. , 9 L. Ed. 2d 133; Marine Engineers Ass'n v. Interlake Steamship Co., U. S. , 8 L. Ed. 2d 418; San Diego Bldg. Trades v. Garmon, 359 U. S. 236; Youngdahl v. Rainfair, 355 U. S. 131; Cavett v. Machinists Lodge 34, 355 U. S. 39; Electrical Workers v. Farnsworth & Chambers Co., 353 U. S. 969; Teamsters Local Union v. Kerrigan Iron Works, 353 U. S. 968; Garmon v. San Diego Bldg. Trades, 353 U. S. 26; Guss v. Utah Labor Relations Board, 353 U. S. 1; Newberry Co. v. Retail Clerks, Local 560, 352 U. S. 987; Elk Construction Co. v. Pocatello Bldg. Trades Council, 352 U. S. 884; Teamsters Local Union 25 v. New York, N.H. & H.R. Co., 350 U. S. 155; Weber v. Anheuser Busch, Inc., 348 U. S. 468; United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656; Kinard Construction Co. v. Building Trades Council, 346 U. S. 933; Garner v. Teamsters, 346 U. S. 485; Amalgamated Ass'n v. Wisconsin Employment Relations Board, 340 U. S. 383; International Union Auto Workers v. O'Brien, 339 U. S. 454; Hill v. Florida, 325 U. S. 538.*

[32] "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." *29 U.S.C. §157.*

that states may not regulate in respect to rights guaranteed by Congress in §7."

Certainly the union conduct for which Borden seeks relief is "arguably subject to §7 or §8 of the Act." *Garmon, 359 U. S. at 245.* Accordingly there is no state court jurisdiction.

This conclusion is fortified by this Court's reaffirmation of *Garmon* in the *Insurance Agents* case, *361 U. S. 477*, where the rationale of federal pre-emption was re-examined and it was noted that pre-emption is not based on the mere fortuity that the state court record may demonstrate a perfected federal violation. Rather, the pre-emption doctrine is applied to avoid the "conflict inherent in overlapping remedies and successive state and federal adjudication of the same conduct."[33]

Specifically, this Court said in *Insurance Agents:*

> "• • • But of special significance is the fact that the approach to pre-emption taken in Briggs-Stratton was that the state courts and this Court on review were required to decide whether the activities were either protected by §7 or prohibited by §8. This approach is 'no longer of general application,' San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 N. 4, as this Court has since developed the doctrine in pre-emption cases that questions of interpretation of the National Labor Relations Act are generally committed in the first instance to the Board's administrative processes, San Diego Bldg. Trades Council v. Garmon (U.S.) supra, except in the atypical situation where those processes are not relevant to an answer to the question." *NLRB v. Insurance Agents, 361 U.S. at 493, N. 23 (1960).*

[33] Meltzer, *The Supreme Court, Congress and State Jurisdiction Over Labor Relations, 59 Col. L. Rev. 6 at 15 (1959).*

3.

Gonzales does not permit State Jurisdiction of the case.

The state court reliance upon *IAM v. Gonzales, 356 U. S. 617*, was misplaced. Borden's action falls within the explicit limitation that the majority opinion placed upon the *Gonzales* exception to the general preemption rule.

At the outset *Gonzales* was a suit for restoration of union membership,[34] admittedly a subject matter that LMRA does not treat—the act specifically negates restriction upon union rules with respect to acquisition or retention of membership.[35] Having conceded state court competence to protect Gonzales' rights of membership—the preemption issue was narrowed to whether the state court could complete its remedy by awarding damages to compensate for the pecuniary loss flowing from his ouster from the union.[36]. The Court found the case to be one of only "peripheral concern" to the federal scheme and sustained state court jurisdiction commenting: that

> "The suit did not purport to remedy or regulate union conduct on the ground that it was designed to

[34] We have no question of loss of union membership, for Borden alleged a continuity of union membership. (R. 11.) Moreover, the jury found that Borden was "cleared in" to the Dallas Local. (R. 63.)

[35] Section 8(b)(1)(A) provides: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *." *29 U.S.C. 158(b)(1)(A).*

[36] A recent law review article argues that the sole justification for the *Gonzales* decision is the undesirability of requiring a litigant to seek out two forums in order to obtain complete relief.

"Even the Supreme Court, the conscientious guardian of exclusive NLRB jurisdiction has relented to avoid requiring a party to pursue two wholly separate remedies to vindicate his contract rights. *International Ass'n of Machinists v. Gonzales.*" Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L.R. 529, 555 (1963).

As earlier indicated, complete vindication of Borden's private wrong, if one existed, was available through NLRB procedures.

> bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under §8(b)(2). This important distinction between the purposes of federal and state regulation has been aptly described: * * * The state court proceedings deal with arbitrariness vis-a-vis the individual union members and the union; the Board proceedings, looking principally to the nexus between *union action and employer discrimination* * * *" *356 U.S. at 622, 623* (Emphasis added).

This affords no basis for state jurisdiction of Borden's cause of action which complains only of union action (refusal of referral) producing employer discrimination (refusal to hire.)[37]

Can the state courts impose their sanctions upon this "nexus between union action and employer discrimination" by the simple expedient employed by the Texas Courts? i.e., job referral is a right of membership and arbitrary denial of referral gives rise to a common law cause of action. The Texas court assumed the touchstone of Gonzales to be "arbitrary conduct" by a union against a member, regardless of the connection between the union conduct and employment.

If this were the proper reading of *Gonzales*,[38] it is immediately apparent that Fowler, *Radio Officer's v. N.L.R.B.*, *347 U. S. 17*, would have enjoyed concurrent remedy within

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[37]"Borden sought money damages both actual and punitive, for loss of earnings and mental anguish, arising out of allegedly wilful, malicious and discriminatory course of conduct of the two unions; same consisting of the refusal of the unions to treat appellee as any other union member and to refer him to a job offered him in the construction of the Republic National Bank Building." (R. 348.)

[38]It would be equally simple to characterize as arbitrary a refusal to refer because of membership in a sister local, matters clearly regulated by the NLRB. *NLRB v. Local 340, Electrical Workers, 301 F. 2d 824 (C. A. 9, 1962).*

the state courts. The contract between union and employer required the employer to hire only "Radio Officers who are members of the Union in good standing." *347 U. S. at 29.* When Fowler reported for work without union clearance he was immediately suspended from the union, and the employer was notified that Fowler was not in good standing, resulting in Fowler's termination *(347 U. S. at 30).* The N.L.R.B. found that the suspension was "in disregard of Fowler's rights under the union by-laws and constitution" *(347 U. S. 30, N. 25)*, a finding accepted by this Court. Thus, the test employed by the Texas Court (arbitrary denial of rights under Union constitution) inexorably leads to overlapping jurisdiction between state courts and the National Labor Relations Board.

The rationale of *Gonzales* is not to be found in looking simply to the question of "arbitrary conduct" by a union directed against a member, nor even to the existence of a violation of the member's rights under the union constitution—the tests articulated by the Texas Courts. The proper test is that expressed in *Gonzales* to be "the nexus between union action and employer discrimination."

4.

Gonzales requires re-examination.

We have demonstrated that both majority and minority in *Gonzales* require rejection of state court power to determine Borden's suit. We now turn to an examination of the validity of *Gonzales* in the light of the later *Garmon* opinion and the applications which the state courts have made of *Gonzales* in the last five years.

The core of the pre-emption idea, resting squarely on the supremacy clause, is that the states cannot set aside Congressional enactments. *Gonzales* was decided when a majority of this court was assuming that the application of federal pre-emption depended primarily on possible conflict of remedies, *United Construction Workers v. Laburnum, 347 U. S. 656 (1954); International Union, U. A. W. v. Russell, 356 U. S. 634 (1958).* But *Garmon* examined and rejected this assumption, and properly based preemption, not on the narrow grounds of possible conflict of remedy, but on the conduct under examination, i.e. "the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted" *356 U. S. at 243.*[10]

Thus *Gonzales* is consistent with the skein of preemption decisions only on the narrow ground of involvement with matters of "merely peripheral concern," not basically interwoven with the activities which the federal scheme seeks to regulate. So limited, *Gonzales* is consistent with the other opinions of this court, and makes sense. Except that it per-

[10] The Court thus in *Garmon* returned to the rationale explicated in *Garner v. Teamsters, 346 U. S. 485, 489-491:*

> "The question then is whether the state, through its courts, may adjudge the same controversy and extend its own form of relief.
>
> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies • • • A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner v. Teamsters, 346 U. S. 485, 489-491.*

See also, *NLRB v. Insurance Agents, 361 U. S. 477 at 493, note 23;* see p. 27, *supra.*

mits the States, rather than the NLRB, in the first instance to determine the scope of the federal Act.

What *Gonzales* does not envisage, and what the last five years have shown, is the disparate determinations as to what is "central" and what is "peripheral" which come when fifty separate states, with their varying policy notions make the decisions. In other words, *Gonzales* makes sense only if the determination as to the scope of the federal Act is made by the *federal* rather than the *state* forum.

The problem persists in the state courts' subsequent application of the *Gonzales* rule. For a southern state's notion of what is "central" to the federal scheme, and what is on the "fringe" is necessarily based on the state courts policy ideas of the purpose, interpretation and effect of the federal statute.[40] And to permit the state court to make this determination of questions of a 'Delphic nature"* has not resulted in either consistency or implementation of the federal regulatory scheme.

To the contrary, the process of "litigating elucidation", *356 U. S. at 619*, by which the majority in *Gonzales* wished to mark the boundaries between what is central—and federal, as distinguished from that which is peripheral—and state, has actually served to obscure the boundaries, and as in the case at bar, to permit state determination of issues basic to the administration of the federal Act.

A number of state courts, such as Texas, have assumed that *Gonzales* permits application of state common law to

[40]Except in the limited area of §14(b) of the federal Act, p. 38 n. 45, *infra*, Congress has provided that such determination be made by utilizing the expertise of NLRB.

Int'l Ass'n of Machinists v. Gonzales, 356 U. S. at 619.

any suit by individuals against labor unions. Thus, in *Gossett v. Local 185,* S. W. 2d , 51 L.R.R.M. 2664 (Tex. Civ. App. 1962) another Texas Court of Appeals "assumed, without deciding," that it would have jurisdiction over a suit by a member against his union grounded on "alleged acts of discrimination which prevents plaintiff from pursuing his trade as a member of Local Union No. 185." These courts justify jurisdiction on the enforcement of state policy, without regard to the federal scheme governing such conduct. The result is federal rights are vouchsafed or denied, depending on the policy notions of the particular state tribunal, viz:

Idaho: Following an alleged improper suspension from union membership which resulted in his loss of employment, Lockridge sued the union for compensatory and punitive damage caused by the suspension (he did not seek reinstatement). The Idaho Supreme Court, in reversing the trial court's dismissal on the ground of federal pre-emption, stated:

> "We must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs 'neither protected nor prohibited' nor 'pre-empted' by federal law, or more appropriately, by the National Labor Relations Board." *Lockridge v. Motor Coach Employers, 369 P. 2d 1006 (1962).*

Kansas: The Supreme Court of Kansas recently affirmed state court jurisdiction over an action brought by an individual alleging that the defendant union "caused plaintiff to be discharged from his said employment because plaintiff was not a member of said union." The Court stated:

> "In the case at bar there can be no question that the action is maintained under the common law of Kansas

> as aided and fortified by the recent 'right to work' constitutional amendment. Actually there is little that the National Labor Board could give to this plaintiff. The job was one of temporary character and has long since been completed; the Board could hardly restore plaintiff to his job. It might restore certain wages, but that is only a small part of plaintiff's damages alleged in the petition *supra*. He is entitled under state law to attempt to prove these damages." *Taylor v. Hoisting Engineers, Local 101, 189 Kan. 137, 368 P. 2d 8 (1962).*

Ohio: In the state courts of Ohio Perko sued his union alleging that that union and its officers had conspired to deprive plaintiff of his opportunity at work and had coerced, by threat of strike, one employer to discharge plaintiff. The Ohio Supreme Court, in sustaining jurisdiction, commented:

> "The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of an action to recover damages for a common law tort, which is also an unfair labor practice proscribed by the Act, as to preclude an appropriate state court from exercising jurisdiction." *Perko v. Local 207, Ironworkers, 168 Ohio St. 161, 151 N.E. 2d 742 (1958).*[41]

Arizona, North Carolina, California and *Tennessee* have been equally willing to accept jurisdiction over similar controversies, apply their own common law, and adjudicate the rights and duties of the parties.[42]

[41] Certiorari has been granted in the *Perko* case, and it will be argued at the same time as the case at bar.

[42] *Sheet Metal Workers v. Nichols, 89 Ariz. 187, 360 P. 2d 204 (1961),* suit alleging oral conspiracy to deprive plaintiff of employment in violation of state right to work law; *Willard v. Huffman, 250 N. C. 396, 109 S. E. 2d 233 (1959), cert. denied, 361 U. S. 893; Pierce v. Otis Elevator, 331 P. 2d 481 (1958); Dick v. Large, 51 L.R.R.M. 2672 (Tenn. Ct. of App. 1962).*

Other state courts have not been so receptive to such litigation.

Pennsylvania: Wax sued his union alleging improper expulsion from the union, and as a consequence of the expulsion an inability to obtain employment. He sought reinstatement and damages. The Pennsylvania Supreme Court held the action pre-empted to the exclusive jurisdiction of the NLRB, concluding that the activity was 'arguably subject to a §8 proceeding" relying upon *San Diego Bldg. Trades v. Garmon, 359 U. S. 326; Wax v. Int'l Mailers Union, 400 Pa. 173, 161 A. 2d 603 (1960).*

New York: A New York appellate court declined jurisdiction over a suit that sought damages, "for the alleged wrongful termination of the plaintiff's employment * * * stemming from the allegedly invalid expulsion of plaintiff from membership in defendant union." The plaintiff sought only damages and not reinstatement, the Court, finding no jurisdiction, remanded to permit plaintiff to alter his cause of action to seek reinstatement. *Green v. Folks, 13 App. Div. 2d 744, 215 N. Y. S. 2d 116 (1961).*[43] On remand, plaintiff dropped employer as a defendant and recast his pleadings, tracking *Gonzales*. The Appellate Division, believing that it was required by *Gonzales*, then accepted jurisdiction of the very controversy which had earlier been refused. *223 N. Y. S. 2d 80.* If *Gonzales* permits this, federal jurisdiction as to matters at the heart of the federal statute may be defeated.

[43] See also *Fullerton v. International Sound Technicians, 194 Cal. App. 2d 805 (1961)*; cf. *Hod Carriers Local 502 v. Park Arlington Corp., 73 N.J.S. 433, 180 A. 2d 181 (1962).*

merely by the turn of emphasis in a pleading. Such a rule will devastate the federal policy.

If state courts are permitted to apply their own common law concepts to these rather intricate union-employer-member relationships, the rights of the member-employee are governed only by the accident of residence. The effect of state court involvement is apparent, and even the states "salutary efforts to redress private wrongs" cannot justify their disruptive effect.

Moreover, if state courts remain empowered to determine their own jurisdiction based on their own notions of the policy and scope of the federal statute there will be further disruption of the federal scheme. The proper rule would commit these controversies in the first instance, to the NLRB procedures. Cf. *NLRB v. Insurance Agents, 361 U. S. 477, 493 (1960).*

5.

There is no compelling State interest to justify an exception to preemption.

This Court has recognized state jurisdiction in controversies attended by violence "because the compelling state interest in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *San Diego Bldg. Trades v. Garmon, 359 U. S. at 247.* The opinions of the Texas courts do not suggest the existence of "compelling state interest." The Texas Supreme Court simply articulated a com-

mon law cause of action: willful denial of a "job opportunity to which Lanham knew he [Borden] was entitled under the rules and procedures established by petitioners for allocating work among their members * * *" (R. 34).

Texas' mere expression of interest in regulating a type of conduct that has already become the subject of federal regulation in Taft-Hartley does not justify acquisition of jurisdiction, for

> "Controlling and therefore superseding Federal power cannot be curtailed by the state even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber v. Anheuser Busch, 348 U.S. 468, 479 (1955).*

Nor does the fact that Borden's complaint alleged unspecified rights under Article 5207A of the Texas statutes,* vest

*This Texas statute provides:

"Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

"Section 2. No person shall be denied employment on account of membership or nonmembership in a labor union.

"Sec. 3. Any contract which requires or prescribes that employes or applicants for employment in order to work for an employer shall or shall not be or remain members of a labor union, shall be null and void and against public policy. The provisions of this Section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to any new agreement or contract executed after the effective date of this Act.

"Sec. 4. Definitions. By the term 'labor union' as used in this Act shall mean every association, group, union, lodge, local, branch or subordinate organization of any union of working men, incorporated or unincorporated, organized and existing for the purpose of protecting themselves and improving their working conditions, wages, or employment relationships in any manner, but shall not include associations or organizations not commonly regarded as labor unions.

"Sec. 5. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstances, shall for any reason be adjudged to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act and the application thereof, but shall be confined in its operation to the portion of the Act directly involved in the controversy in which judgment shall have been rendered and to the person or circumstances involved." *Article 5207 a, Rev. Civ. Stat. of Texas.*

jurisdiction in the state courts.[45] Neither the Texas Court of Civil Appeals nor the Supreme Court of Texas deemed that they were enforcing any rights under this statute. The Texas opinions make clear that Texas courts are implementing only "rights of membership" and protecting against "arbitrary" action.

Moreover, as we have demonstrated, Congress has made clear that in labor relations matters within the federal statute, such state policy must give way to the effectuation of the uniform national labor policy. Only in the limited circumstance narrowly defined in Section 14(b) of the federal Act may the states act. While Congress has there left to the states the prohibition of the execution or application "of agreements requiring membership in labor organization as a condition of employment,"[46] this record shows no such agreement. Additionally, this court's reversal of the Georgia Supreme Court in *Laborers Local 438 v. Curry*, U. S. , *9 L. Ed. 2d 514, 518 (1963)*, makes clear that the state "right-to-work" law has no valid application to the activities disclosed by this record.[47]

This Court's recent recognition of State Court competence to enforce collective bargaining contract rights at the behest of members beneficiary of such contracts, is only an affirm-

[45] Plaintiff for the first time alluded to Art. 5154 of the Texas Statutes (Reprinted Appendix p. 56, *infra*) in its Brief in Opposition to Petition for Certiorari. (p. 2.) On its face this statute has no application, nor is it referred to by any of the Texas courts in their various opinions. Apparently the reference should have been to 5154g (reprinted Appendix p. 57). It too has not been referred to in the past by plaintiffs or the state courts.

[46] Section 14(b) of the federal Act provides, *29 U.S.C. 164(b)*:

"(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

[47] See also, *Electrical Workers v. Farnsworth & Chambers, 353 U. S. 969.*

ance of the concurrent jurisdiction of state courts in the narrow area of enforcement of collective bargaining contract rights. *Smith v. Evening News, 371 U. S. 195 (1962)*. But the case can give no comfort to Borden. For it permits state action pursuant to Section 301 of the Federal Act, *29 U. S. C. 185(a)*, in the limited area of collective bargaining contract enforcement. Borden admits in his response to the petition for certiorari herein: "Only a brief glance at the facts of the case will show that there was no collective bargaining agreement involved * * *." *(Opposition to certiorari, p. 8)* Thus, since this suit is not grounded on any collective bargaining agreement, the *Evening News* case is not apposite.

Finally, any thought that Congress intended to leave unfettered the effectuation of state policy in this realm is negatived by Congressional enactment of the Landrum-Griffin amendments. *73 Stat. 519, 29 U. S. C. 153, et seq.*

If Congress had been so inclined, the passage of the Labor Management Reporting and Disclosure Act of 1959, afforded an ideal opportunity to provide a state and federal court remedy for claims such as Borden's. It chose just the contrary. In *Title I 73 Stat. 522; 29 U. S. C. 411*, Congress expressed its view of the internal rights of members within labor organizations: to vote, to participate fully in union decisions, to be free from improper union discipline. In these areas Congress created a federal remedy and preserved existing state court remedies.

Conversely, it chose to amend §8 of L.M.R.A. to provide more explicit guidelines for NLRB regulation of union hir-

ing halls in the construction industry, *73 Stat. 545, 29 U.S.C. 158(f).*"

CONCLUSION

To require state tribunals to keep hands off controversies with respect to the establishment and operation of hiring halls and referral procedures makes sense in the effectuation of a uniform national policy. Moreover, it makes sense to rely on the expertise of a specialized tribunal to apply its knowledge of labor economics to the preservation of traditional institutions by which labor and management prosper in providing the requisite labor skills at the appropriate time to keep the economy moving. Congress has indicated, and experience has confirmed, that abuses arising in the operation of such institutions can be fairly curbed, and both public and private interests vindicated by the federal tribunals under the federal Act.

State courts centering on vindication of private rights, while ignoring the social utility of the institutions which are rendered inoperable by such single-minded attention to the interest of the individual, can only serve to upset the federal regulatory scheme.

"Section 8(f) of the Act as amended now provides: "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members * * * because * * * (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or give such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies the minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area * * *."

The denial of state jurisdiction does not leave the individual without remedy. The federal scheme assures the individual protection both in the requirement that the wrongdoer "cease and desist" from the unfair labor practice, and in the award of reinstatement with back pay.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully,

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March 3, 1963.

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APPENDIX

The relevant portions of the Labor Management Relations Act, of 1947 (61 Stat. 136, 29 U.S.C. 141 et seq.), are as follows:

Section 1:

* * * * *

(b)

* * * * *

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the right of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and mangement which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Section 2. Definitions.

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or associa-

tion operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between and foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but

through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encour-

age or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representatives of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by an action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agree-

ment requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8 (a) (3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly

local in character, even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion

of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or

not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order

such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified

by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

The Relevant Texas Statutes are:

"Art. 5207a. Right to bargain freely not to be denied; membership in labor union:

"Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

"Sec. 2. No person shall be denied employment on account of membership or nonmembership in a labor union.

"Sec. 3. Any contract which requires or prescribes that employees or applicants for employment in order to work for an employer shall or shall not be or remain members of a labor union, shall be null and void and against public policy. The provisions of this Section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to any new agreement or contract executed after the effective date of this Act.

"Sec. 4. Definitions. By the term 'labor union' as used in this Act shall mean every association, group, union, lodge, local, branch or subordinate organization of any union or working men, incorporated or unincorporated, organized and existing for the purpose of protecting themselves and improving their working conditions, wages, or employment relationships in any manner, but shall not include associations or organizations not commonly regarded as labor unions.

"Sec. 5. If any clause, sentence, paragraph or part of this Act, or the application thereof to any person or circumstances, shall for any reason be adjudged to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act and the application thereof, but shall be confined in its operation to the portion of the Act directly involved in the controversy in which judgment shall have been rendered and to the person or circumstances involved. Acts 1947, 50th Leg., p. 107, ch. 74."

"Art. 5154. [5246] Organizations excepted

"The preceding Article shall not be held to apply to any combination or combinations, or to any act by any member of such trades union or other organization or association, or any other person, or to an agreement between two or more persons, formed or taken for the purpose of limiting the production, transportation, use or consumption of labor's products, or which creates a 'Trust' or 'Conspiracy in Restraint of Trade', as defined by the laws of this state. Nothing herein contained shall be held to interfere with the terms and conditions of private contract with regard to the time of service or other stipulations between employers and employees. Nothing herein shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies. Acts 1899, p. 262; Acts 1947, 50th Leg., p. 530, ch. 310, § 2."

Art. 5154g, R.C.S.

Section 1. It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not

be denied or abridged on account of membership or non-membership in any labor union or labor organization and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion.

Sec. 2. It shall be a violation of the rights set forth in Section 1 for any person or persons, or associations of persons, or any labor union or labor organization, or the members or agents thereof, acting singly or in concert with others, to establish, call, maintain, participate in, aid or abet any strike or picketing, an object of which is to urge, compel, force or coerce any employer to recognize or bargain with, or any employee to recognize or bargain with, or any employee or group of employees to join or select as their representative, any labor union or labor organization which is not in fact the representative of a majority of the employees of an employer or, if the employer operates two or more separate and distinct places of business, is not in fact the representative of a majority of such employees at the place or places of business subjected to such strike or picketing.

Sec. 3. In any proceeding or suit that may be instituted under the provisions of Section 2 hereof, the trial judge, prior to final hearing thereon, is hereby authorized to order an election, by the employees of the employer subjected to strike or picketing, for the purpose of determining whether a labor union or labor organization is in fact the representative of a majority of the employees of said employer, and any such election shall be held, within twenty (20) days after the institution of such proceeding or suit, by a disinterested master appointed by the trial judge, under rules of pro-

cedure prescribed by the trial judge, which shall provide that the employer and the said labor union or labor organization may each have one representative present at the voting place or places as an observer, such representatives to be approved by the trial judge, and the voting of such election shall be by secret ballot. The ballots used in all elections under this Act shall be on plain white paper through which printing or writing cannot be read, shall be uniform in size, and shall not be numbered nor have attached in any manner any form of stub nor shall the person using said ballot be required to sign the same. Employment lists will be checked and no employees shall be allowed to vote more than once. Each ballot shall be initialed by the judge before being presented to the voter. All employees of the employer at the time of the commencement of the strike or picketing complained of shall be eligible to vote in any such election except employees who have since quit or been discharged for cause, which shall not include the participation in the strike or picketing complained of, and have not been rehired or reinstated prior to the date of the election; provided, however, that permanent replacements of employees on strike shall be eligible to vote in any such election.

Sec. 4. Any person, organization or association who violates any of the provisions of this Act shall be liable to the person suffering therefrom for all resulting damages, and the person subjected to strike or picketing in violation of this Act is given right of action to redress such wrong or damage, including injunctive relief, and the District Courts of this

State shall grant injunctive relief when a violation of this Act is made to appear.

Sec. 5. The State of Texas, through its Attorney General or any District or County Attorney, may institute suit in the District Court to enjoin any person or persons, association of persons, labor union or labor organization from violating any provision of this Act.

Sec. 6. Any party to any suit or cause of action arising under this Act may make, within two (2) days after notice of the institution of said cause, application to the Presiding Judge of the Administrative Judicial District within which the suit is filed who shall immediately assign a District Judge from within said Administrative Judicial District who shall then hear all proceedings in the cause.

Sec. 7. If any word, clause, sentence, paragraph or part of this Act, or the application thereof to any person or circumstance, shall for any reason be held invalid, such invalidity shall not affect the remaining portions of this Act, it being the intent of the Legislature to pass the valid parts of this Act even though some one or more words, clauses, sentences or paragraphs shall be held invalid. (S. B. 45, Acts 1955, 54th Leg., Ch. 387, p. 1029.)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 541

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES,

Petitioner,

vs.

H. N. BORDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR RESPONDENT

Opinions Below

Borden agrees with Local 100 as to previous opinions in this cause.

Jurisdiction

Borden agrees to the jurisdiction of this Court.

Question Presented

The question presented by the union in the Petition for Writ of Certiorari was:

"Does a state court have jurisdiction to award compensatory and punitive damages against a labor union for its refusal to issue a job referral to a member, which refusal resulted in denial of employment by an employer whose operations affect interstate commerce? Is such conduct by a labor union 'potentially subject to the exclusive federal regulatory scheme' expressed in the Labor Management Relations Act of 1947, and thus limited to the exclusive jurisdiction of federal tribunals under the Federal Act?"

Bordon would respectfully differ and submit that the true question presented is:

Where the action of a labor union, not a certified bargaining agent, in willfully and maliciously denying a member of the union his right to work and labor in violation of the union's Constitution and By-Laws and established rules and procedures, state right to work laws and the union member's inherent right to work is accompanied by threats of expulsion and bodily harm and abusive cursing:

1. Does a state court have jurisdiction of a suit by the union member for breach of contract and in tort for actual and punitive damages and damages for mental pain and suffering?

2. Is such conduct by the labor union subject to the exclusive jurisdiction of the National Labor Relations Board under the Labor Management Relations Act of 1947, as amended?

Statutes Involved

The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. 141, *et seq.*), are

set forth in Appendix, *infra*, pages 41-46. The relevant provisions of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 401, *et seq.*), are set forth in Appendix, *infra*, pp. 47-48.

The provisions of Article 5207a, Tex. Rev. Civ. Stat., Article 5154 and 5154g, Tex. Rev. Civ. Stat. are set forth in Appendix, *infra*, pages 48-49.

Statement

This is not a wrongful hiring hall or an injunction case. Borden's action sounds both in contract and in tort.[1] The Texas Courts accepted jurisdiction and awarded damages for actual loss and punitive damages for Local 100's violation of the contract between the parties and the willful and malicious breach of Borden's common law inherent right to labor and earn money and his rights as set forth in Article 5207a, Revised Civil Statutes of Texas.

A.

Pleadings in the State Court

Borden brought suit against Local 100 and the United Association and in his First Amended Original Petition (R. 16) and his Trial Amendment (R. 57) alleged that he is a member of Local 100 and its parent international union. It is alleged that he was entitled to present his paid up dues book to Local 100 and become a member in good standing and that, on or about September 15, 1953, he did present same to Cleo Lanham, Business Manager of Local 100, who wrongfully refused to accept it; that he was entitled to and did present his clearance card to Lanham and become

[1] As shown by opinion of the Court of Civil Appeals of Texas (R. 350).

a member of Local 100 and that Lanham wrongfully refused to accept same until October 9, 1953.

He alleges that he was offered a job by Farwell Construction Co. and was entitled to be referred by Local 100 to said job; that Lanham cursed and abused him and refused to refer him to the job; that all of the actions of Lanham were wrongful, willful and malicious; and that Lanham was the authorized agent of Local 100 and his conduct was known to and ratified by said Local and The United Association (parent union).

Borden alleges that the conduct of Lanham violated his contract rights under the Constitutions and By-Laws of Local 100 and United Association and thus constituted a breach of contract; and that Lanham's actions tortiously deprived him of his inherent right to labor and earn his livelihood. That he had no effective remedy through the unions and that he was subjected to threats of bodily harm to his person and of expulsion from the union, and pursuit of any supposed internal remedies would be futile and illusory.

Borden asked for compensatory damages, damages for mental pain and suffering caused by acts of Local 100 and United Association and punitive damages for the malicious and wrongful conduct.

Local 100 challenged the state court's jurisdiction on the basis that the subject matter of the suit was pre-empted by the Labor Management Relations Act of 1947.

B.

STATE COURT DISPOSITION OF PLEAS AND TRIAL ON THE MERITS

The trial court, District Court of Dallas County, Texas, at a preliminary hearing sustained the union's pleas to the jurisdiction of the state court and its further plea that a

member of an association cannot bring suit against his own association (R. 16). The Court of Civil Appeals of Texas at first affirmed the trial court on both pleas (R. 61) and then, before the judgment was final, withdrew the opinion and entered its opinion dated July 25, 1958, reversing the trial court remanding the cause for trial on the merits (R. 22).

The Supreme Court of Texas then granted Writ of Error on the question of whether a member of a union may sue his own union. The unions did not apply for writ of error on the jurisdictional question. That court, in its opinion, affirmed the Court of Civil Appeals and remanded the case for trial on the merits. 160 Tex. 203; 328 SW 2d 739 (R. 26-48).

The case was tried before a regular 12 man jury and the trial court dismissed the United Association.[2] The case as to Local 100 was submitted to the jury on special issues. The jury, in answer to the issues contained in the Court's charge, found that Borden was promised a job on the Republic Bank Building by Farwell Construction Company;[3] that at the time Farwell asked for Borden he was available for work;[4] that Local 100, acting through Lanham, willfully refused to let Borden work on the job;[5] that Lanham knew under the rules of Local 100 that Borden was entitled to work on the job;[6] that Local 100 approved Lanham's con-

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[2] The trial court granted the International's Motion for Instructed Verdict after presentment of the case but before submission to the jury, such Motion being granted solely due to a lack of evidence on which to submit special issues to the jury as to that Defendant.

[3] Special Issue No. 1 (R. 62).

[4] Special Issue No. 1 (R. 62-63).

[5] Special Issue No. 5 (R. 63).

[6] Special Issue No. 6 (R. 64).

duct;[7] that Borden suffered actual damages in the amount of $1,916.00;[8] that Borden suffered mental anguish[9] and was awarded damages in the amount of $1,500.00 for mental pain and suffering;[10] and he was awarded $5,000.00 as punitive damages;[11] and that it would have been useless for Borden to pursue his complaint within the union.[12]

Local 100 is in error in its Brief (p. 6) when it states that the jury found against Borden's claim on denial of his membership rights. Special Issue No. 3 is predicated on Special Issue No. 2 and inquires as to whether Local 100 refused to accept Borden's clearance card after the "call" was placed to Local 100 by Farwell's foreman for Borden.[13]

The trial court judgment (R. 60-72) disallowed the $1,500.00 awarded Borden for mental anguish (R. 71) and ordered a remittitur of the punitive damages in excess of the actual damages, thus allowing actual and punitive damages in the amount of $3,832.00 (R. 71).

The Court of Civil Appeals affirmed the judgment of the trial court, 355 SW 2d 729 (R. 348-360) overruling the points of error of both Local 100 and Borden.

Local 100 then applied for writ of error to the Supreme Court of Texas on the sole basis that the jurisdiction of the

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[7] Special Issue No. 8 (R. 64).

[8] $1,916.00 being the difference between the jury's answers to Special Issues Nos. 9 and 10 as allowed by the Court (R. 64-65).

[9] Special Issue No. 11 (R. 65).

[10] Special Issue No. 13 (R. 66).

[11] Special Issue No. 14 (R. 66).

[12] Special Issue No. 22 (R. 68).

[13] Special Issue No. 3 is not limited as to time except by Special Issue No. 2 (when Thurman placed a call for Borden). The jury could by its answer have found that Borden had been refused clearance but his clearance card accepted prior to the "call" by Thurman. In any event Borden's claim of denial of union rights is not based on this special issue since it is admitted that he was a member of Local 100 and that his clearance card had been accepted on October 9, 1953 (R. 12).

state courts was pre-empted (R. 36). The United States Supreme Court granted certiorari on December 17, 1962 (R. 362).

C.

Facts

Local 100 is the Dallas based local plumbing union of the international union, United Association of Journeymen and Apprentices, etc. The Local had a membership of approximately 800 men in 1954 (R. 24). Borden is a member of both the local and international unions and at time of trial in 1960 was 63 years of age.

Members of one local of the United Association have an unqualified right, if in good standing, to transfer to any other member local of the Association.[14] A local union must accept a member of a sister local upon his presentment of a clearance card,[15] a paid-up Dues Book or a deposit of $10.00 as a guaranty of good faith.[16]

Borden arrived in Dallas, Texas, in mid-September, 1953, and called Mr. Jack Heath, Job Superintendent for Farwell Construction Company on the Republic National Bank construction project (R. 80). Farwell was already acquainted with the quality of his work (R. 79). The next day he presented his union dues book to Cleo Lanham, the Business Manager of Local 100. Lanham told him:

> "Yes, I have had a call on you. You are not going to work" (R. 83).

> "You are not going to work down there on the bank job or for Farwell, you have come in here wrong, you have come in here with a job in your pocket" (R. 84).

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[14] Sections 154-162, Plf's Ex. No. 7 (R. 339-341).
[15] Section 158, Plf's Ex. No. 7 (R. 339-340).
[16] Sections 160, 161, Plf's Ex. No. 7 (R. 341).

The next day Lanham told him that he would not go to work on the bank project as long as he (Lanham) was manager of the Union and that the best thing Borden could do would be to leave town (R. 85).

After trying unsuccessfully for four days to be admitted to Local 100 and commence work Borden went to Shreveport, La., to get his clearance card (R. 94-95). Upon returning to Dallas he attempted for approximately two days to present his clearance card to the Union and was rebuffed (R. 97-98), until he found Lanham in a cafe on the third day (R. 98). At that time Lanham reluctantly accepted the clearance card, cursed Borden and said:

> "That don't mean you are going to work by no means" (R. 99).

Borden then called A. G. Thurman, foreman on the construction project, informing him that he had placed his clearance card with the Union and asked if he still had a job opening. Thurman told him that he still had a place for him, whereupon Borden asked that he place a "call" for him (R. 145). Thurman called Lanham at the Union and asked that Borden be sent to the bank project if they gave him a referral (R. 145). Lanham then told Thurman:

> "I am not about to send that old son of a bitch down there, he shoved his card down our throat and I am not about to send him to the bank" (R. 145).

Borden never did go to the project and ask for a job from Farwell (R. 106). He did continually request of the Union employment on the bank job (R. 100). Work continued unabated on the bank during the period from September 15, 1953 to September 15, 1954 (R. 148).

When a man was called for by name by a contractor, it is undisputed that it was the uniform practice of Local 100

to send that particular man. This practice had been in effect at least for eleven (11) years (R. 223, 226).

Borden complained of his wrongful treatment to Fred Zuefeldt, business agent of Local 100, and numerous others (R. 101) as well as John Galvin, Lanham's successor (R. 227). The membership of Local 100 was informed of the actions taken against Borden, by a reading of the Executive Board minutes, at a general meeting in October, 1953 (R. 218). A meeting of the Executive Board was convened in October, 1953, to consider Borden's complaint (R. 316). At this meeting Borden was told to quit complaining about the treatment he had received from the Union or they would expel him from the Union and kick him out of Dallas (R. 131). The minutes of the Executive Board meetings of Local 100 were subpoenaed for the trial but, interestingly enough, were lost while in the possession of Zuefeldt, the business agent.

The threats against Borden at the Executive Board meeting made him fear bodily harm (R. 131). He became nervous and upset after the action taken against him by Local 100 in 1953 (R. 268).

Petitioner bases its case on an erroneous assumption that the record reveals only four possible reasons for the Union action in refusing to allow Borden to work on the bank job (Brief for Petitioner, pp. 9, 19). Reasoning by the method of residues is always fallacious if all alternatives are not considered. Thurman's testimony furnishes another reason. Lanham told him that Borden was not going to work on the bank because "he shoved his card down our throat" (p. 145). Thus, the reason was because Borden was trying to exercise his union rights. Lanham could also have meant that at 57 years of age Borden was too old. The Executive Board minutes were lost and Lanham never even admitted that he had received a call for Borden or there might have

been other reasons. Whatever the reason, it was found by a qualified jury to be wrongful under the rules of Local 100 and the action based thereon was judged by a court competent in tort and contract law to be willful and malicious.

The Mechanical Contractors Association of Dallas, Inc., of which Farwell was a member, executed a Member Only Agreement with Local 100 in June, 1953 (Plf's Ex. No. 8, R. 273), which was in effect through September 15, 1954. This was not an exclusive bargaining contract nor was Local 100 the certified bargaining agent for the employees of Farwell. There was no contractual agreement between the Union and Farwell for the maintenance of a hiring hall and Borden does not complain of any illegal hiring hall system or actions of Farwell. Borden was never employed, nor his employment terminated, by Farwell; and he never requested that Farwell employ him without a referral (R. 106).

This case does not test the power of states to regulate hiring halls as Petitioner contends (Brief of Petitioner, p. 11); it does exhibit the power of a state court to enforce the contract rights of a member against his Union and award damages for a malicious and willful tort committed against a member by his union.

Summary of Argument

I.

This Action Does Not Come Within the Terms of the Federal Act

A. This action was brought in the District Court of Dallas County, Texas, a court of general jurisdiction, for breach of contract and for tort action resulting in damages. The suit was not cast in allegations which would intentionally or accidentally come within the terms of the Federal Act. It is based on state law and, indeed, has been found to be both a breach of contract and a tort violation by the Texas courts. The Union breached its contract with Borden in that it maliciously and willfully deprived him of the subject matter of the contract, that is, aid and assistance in securing and retaining favorable employment. The Union also, through malicious and abusive threats of bodily harm, caused Borden to be deprived of his common law right to labor and earn money by the employment of his craft skills.

B. Section 7 of the Act guarantees certain rights to employees. These rights are concerned with labor organization and concerted activities. The conduct of the Union in this case does not involve either. The union was not a certified bargaining agent and no such relationship is in issue, nor any rights thereunder.

No violation of Section 8 of the Federal Act is involved. There was no motive on the part of the Union, either expressed or implied, to encourage or discourage Borden's membership in the Union. He was already a member of the Union and continues to be so. Complaint is made of threats to terminate his Union membership on the basis of malicious acts condoned and ratified by the entire Union membership.

No attempt was made to cause a prospective employer to discriminate against Borden for the purpose of encouraging or discouraging union membership. The prospective employer was not a party to the suit nor was it involved in any way. Actions which would not have the effect of encouraging or discouraging union membership could not in any wise cause such a result, unless unintentionally and then it would be of no consequence. Such an inference would be the merest speculation based on nothing more than the existence of a union and a member.

Therefore, the basis of Borden's action here concerns subject matter not legislated upon by Congress, either in the protected or the prohibited field under the Act, but cognizable under state law.

II.

This Action Does Not Involve Matters Which Are Exclusively Under the Federal Act

A. A contractual relationship existed between Borden, a union member, and Petitioner, the Union. Therefore, the two parties were competent to contract and did so contract upon a lawful subject matter. The union breached the contract, as determined by a jury upon special issues, by wrongfully, maliciously and intentionally refusing to send Borden to a job of work which was open and available to him. Borden either had to secure approval of the union for work or be in direct violation of the Constitution and By-Laws of the union, thus risking expulsion from the union, and thereby being deprived of an important right, an asset to his earning his livelihood. Indeed, the executive officers of the union, with the approval of the members, did, in fact, make a direct threat of expulsion and bodily harm to Borden when he complained of the union conduct.

It is admittedly clear that Congress did not intend to legislate with regard to private contract rights between a union member and his union. It is clear also that Congress did not, therefore, enact any legislation or establish any forum concerning the violation of such contract rights.

B. State courts asserted jurisdiction under state laws and granted compensatory damages for violation of individual rights constituting a tort. This is such a case, albeit arising out of contract rights. Congress did not intend by the passage of the Labor Management Relations Act to deprive state courts of tort jurisdiction. The jurisdiction of state courts in tort actions has been emphasized and re-emphasized by this court in many decisions.

Absent state court tort jurisdiction, no effective and real remedy is available to an individual for breach of his rights to labor and earn his money by the practice of his skill and craft. There has never been any intent on the part of Congress as expressed in the Act, nor any disposition on the part of this Court, to offer immunity or isolation to any labor organization from the consequences of its tortious and wrongful acts toward its members.

C. The Court has always been quick to deny state jurisdiction in cases of actual or potential conflict with the central scheme of the Labor Management Relations Act. The Court has been equally quick to refuse to interfere with state court jurisdiction on matters which are not central to the administration of the Act, i.e., neither protected nor prohibited activities.

The correction of wrongs done to an individual by means of breach of contract or tort violation are not within the aegis of the stated purposes of the Act, i.e., to lessen strife in labor management relations in industries affected with

interstate commerce. These wrongs are real and substantial to an individual and cry out for correction, but as concerns the purposes of the Act, are no more than peripheral.

III.

Examination of Gonzales and Garmon in Light of Labor Management Disclosure Act of 1959

The sweep of Federal law based on Congressional intent should not be determined by wooden logic based on the mere fact that parties to start court actions are incidentally involved in the labor movement. The law is reasonable, if nothing else. The reasonable construction of *Garmon*, especially in view of expressed Congressional intent in the Labor Management Disclosure Act of 1959, compels a conclusion that for a case to be *arguably* within the jurisdiction of the NLRB to the exclusion of state jurisdiction, it must be *reasonably* arguable in light of expressed Congressional intent; not just plain arguable as a matter of self-interest motivation limited only by the ingenuity of counsel.

It is not the intent of Congress to delegate to the NLRB the initial decision of application of remedies in cases of purely tort and contract law under state jurisdiction, especially where important individual rights which demand vindication are concerned and more especially where, to decide otherwise, requires a strained and artificial construction. The Court has emphasized in a long line of cases that it does not propose to tolerate wrong or injustice committed against an individual under any theory of isolation or immunity because the parties happen to be involved in the labor movement, *a fortiori* when no overwhelming matter of national concern is involved.

ARGUMENT

I

This Action Does Not Come Within the Terms of the Federal Act.

A. Borden's Action Is Based on State Law, Not Federal Law.

It is submitted that Petitioner has erroneously characterized Borden's cause of action. This is not a suit to regulate labor-management relations in general or, specifically, between Local 100 and Farwell. No change is sought in the hiring policies of Farwell nor is that company a party to the suit. Borden was never hired or fired by Farwell and indeed he never sought employment from that company without union referral. This is not a case involving picketing or injunction or any other protected concerted activities.

This is an action under state law sounding both in contract and in tort. It is not based upon violation of the Labor Management Relations Act nor have any allegations been made as to violation of such Act. The substance of the action is concerned exclusively with state law, not federal law. The action is for damages caused by the union's breach of contract and its tortious interference with Borden's right to work. Because of the willful and malicious nature of the union's conduct and the abusive threats made to Borden that put him in fear of bodily harm and caused him to be nervous and upset, punitive damages as well as damages for mental pain and suffering were sought from the union.

Borden complains of discriminatory conduct in the sense that he was singled out for abuse, threats and loss of rights, but the discrimination alleged and proved was not such as

covered by the Taft-Hartley Act. Borden alleged an implied contract between the union and its members, and particularly between the union and Borden, that it would not discriminate unfairly or unjustly between the members.[17] As the Court succinctly set out in *Radio Officers* v. *Labor Board*, 347 U.S. 17, when speaking of the discrimination prohibited by Sec. 8(a)(3) (347 U.S. at p. 43):

> "Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."

That Congress intended only such effect is clear from the wording of the Act, 29 U.S.C. §141, *et seq.*; at §148, which reads insofar as pertinent:

> "Section 8(b). It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . .
>
> Section 8(a). It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization."

B. The Union Conduct Is Neither Protected Nor Prohibited by the Federal Act.

It is important to note that there is absolutely no evidence in the record concerning any agreement or communication between Farwell and the Union except the conversation between Thurman and Lanham (R. 145). The absence of action by the union for the purpose of causing Farwell to

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[17] Plaintiff's First Amended Original Petition, paragraph XV (R. 10 at p. 14).

discriminate against Borden is apparent. The action of the union in refusing to refer Borden was unilateral. No showing is made as to any effect on Farwell.

Material to this point is the lack of any collective bargaining agreement between the union and Farwell, establishing the union as the certified bargaining representative of all employees. *Radio Officers*, as well as the other cases relied upon by Petitioner to establish an unfair labor practice as to this case are inapposite. In each of the following cases the union was the exclusive bargaining agent for all of the employees of the respective employers. The importance of the presence or absence of this material fact is emphasized in *Radio Officers*, where there was a collective bargaining agreement and the union caused the employer to discharge the employee already hired because, under the contract, the employer could not accept the employee without proper clearance; in *Teamsters* v. *Labor Board*, 347 U.S. 17 (a companion case to *Radio Officers*) the union was the exclusive bargaining agent under a contract which gave the union control over the seniority system, and the union security provision in the contract had not been validated as provided by Sec. 8(a)(3). The union reduced an employee on the seniority list wrongfully causing the employer to discriminate; in *Gaynor* v. *Labor Board*, 347 U.S. 17 (another companion case to *Radio Officers*) the union was the exclusive bargaining agent for all employees and caused the employer to make a disparate wage payment to the union members in preference to non-union members; in *Miranda Fuel Co.*, 140 NLRB No. 7 (December 21, 1962), the union, as exclusive bargaining agent, caused the employer to reduce an employee's seniority contrary to the terms of the bargaining agreement; in *NLRB* v. *Federal Iron Works*, 211 Fed. 2d 927 (C.A. 3) the union as exclusive bargaining agent, executed, maintained and enforced an

illegal union security provision by causing the employer to recant and refuse to hire Fink, after his prior acceptance and hire; in *NLRB* v. *Local 340, Electrical Workers*, 301 F.2d 824 (C.A. 9), the employer, by the collective bargaining contract, hired only through the union hiring hall and consequently the employer refused to hire Wood because of union action in not referring. In *NLRB* v. *Local 1423, Carpenters*, 238 F.2d 832 (C.A. 5), it is not shown whether or not the union was the exclusive bargaining agent, and the case can offer Local 100 little comfort. There the employer had already hired three men and transported them some 400 miles to the job site and then, because of the union's threat to strike, was forced to release the men. In *NLRB* v. *Local 100, Plumbers*, 291 F.2d 927, enforcing 128 NLRB 398, the union was not the certified bargaining agent of all of the employees of the employer, but the Board found that Breland had been hired by Beard (employer) and then, because of union action, the employment was terminated and found further that the union action consisted not only of failure to refer but also of a threat by the union job steward to the employer when requesting that the employer not hire Breland.

The courts and Board then have found a Sec. 8(b)(2) violation where the unions by virtue of a collective bargaining contract have exercised rights over the hiring and firing policies of the employer. The exception to this rule being where the union by threats of strike, force and violence, etc. has intimidated an employer to cause him to discriminate against an employee. *Hod Carriers Union*, 134 NLRB No. 72 (Supplemental Decision, November 22, 1961).

Local 100, although it shows no employer action, attempts to bring Borden under the rationale of *Radio Officers* by inferring that Borden had violated a union rule and was being disciplined. There was no pleading or proof by

Local 100 that it had committed a wrong against Borden coming within the prohibitions of 28 U.S.C. §141 *et seq.;* at §158, Sec. 8(a)(1) or Sec. 8(b)(2). On the contrary, the union has heretofore contended, until the filing of its Motion for Rehearing in the Texas Court of Civil Appeals,[18] that no "call" had been placed for Borden by Farwell and that he was treated equally with all other union members.

We could engage in surmise, supposition and pettifoggery with Local 100 as to why Borden was not referred to Farwell but, regardless of surmise and supposition, the material facts show this to be a case involving neither protected nor prohibited activities under the Act. Also, whatever the reason for the union's action, the abuse, cursing, threats, etc. found by the state courts to be tortious and in breach of contract, certainly cannot be characterized as "a mere caprice". The union did not request any action of Farwell; it did not threaten action against Farwell; nor did it cause Farwell to dismiss or fail to hire Borden. The record shows that Borden was never employed, dismissed or refused employment by Farwell. He never requested employment directly of Farwell, nor asked that he be employed without referral (R. 106).

We are aware of no cause decided either by the Labor Board or the Court where a union has been found guilty of an unfair labor practice unless it caused or made an overt attempt to cause the employer to take action in discharging or refusing to hire. The plain wording of Sec. 8(b)(2) of the Federal Act decrees that an unfair labor practice is committed by a union only when it causes or attempts to cause an employer to violate Sec. 8(a)(3) by discriminating for the purpose of encouraging or discour-

[18] The Motion for Rehearing in the Texas Court of Civil Appeals is not included in the printed record but is on file in the Supreme Court.

aging union membership. In the absence of a union right or supposed right of control under a collective bargaining agreement enforced against the employer by a certified bargaining agent, or threat by a union against the employer, in either event causing employer discrimination to encourage or discourage union membership, there is no Sec. 8 (b)(2) violation. In *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667-675, the court reaffirmed its holding in *Radio Officers* v. *NLRB*, 347 U.S. 17 at page 43 that in an employer violation of Sec. 8(a)(3):

> "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test."

It cannot be inferred that, because Farwell requested Borden to obtain a referral from the union, Farwell was guilty of discrimination to which the Act is directed. An illegal purpose or motive on the part of Farwell must be shown in order to say that any action taken by it was illegal discrimination. *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667 at page 675; *Radio Officers* v. *NLRB*, 347 U.S. 17. The holding of the court in *Local 357* repudiates speculation and surmise as engaged in by Local 100. This is particularly true when, as here, the union has not threatened Farwell and, indeed, has not even requested that it not employ. Here there was no certified bargaining agent or hiring hall agreement. Farwell was free to hire its employees through the union or outside of it.[19] Under the union's theory of Sec. 8(b)(2) and Sec. 8(b)(1), a refusal to refer by and of itself is an unfair labor practice. It would be no more illogical under this theory to say that the union has violated the Act as to all other union members not referred to a particular job. To argue that, by mere refusal to refer, a

[19] Although Thurman did testify that he customarily hired through union referrals (R. 214).

violation of Sec. 8(b)(2) or 8(b)(1) is committed is to engage in reasoning dismissed by this Court in *Local 357* where it was conceded that the mere existence of a union probably encourages union membership although such encouragement by itself is not banned by the Act.

The union makes no contention that a protected activity is involved. There being involved neither a protected nor a prohibited activity within the Act, jurisdiction resides in the state court. *International Union, United Automobile Workers, etc.* v. *Wisconsin Employment Relations Board*, 351 U.S. 266.

II.

This Action Does Not Involve Matters Which Are Exclusively Under the Federal Act.

A. Jurisdiction of the State Court to Enforce Contracts.

Assuming the action of the union to be an unfair labor practice, an assumption vigorously denied by Borden, Texas courts have jurisdiction to enforce contract rights between a union and a member of that union or between any other two parties competent to contract regarding a valid or lawful subject matter.

It is admitted that Borden was a member of the United Association (International Union) and Local 100. The constitution and by-laws of a union constitute a contract between the member and the union, *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, *House of Lords in Bonsor* v. *Musicians' Union* (1956 A.P.C. 104), and this contractual concept prevails in *International Printing, Pressmen and Assistants' Union* v. *Smith* (Supreme Court of Texas, 1947), 198 SW 2d 729.

Borden notified Farwell that he was in Dallas and inquired as to job availability and was requested to obtain a referral through Local 100 (R. 144). A call for Borden was then placed with the Union (R. 145). The practice of Local 100 was to refer the man requested by the employer (R. 223, 226). The jury found, in answer to Special Issue No. 1, that Farwell had promised Borden a job (R. 62); in answer to Special Issue No. 2, that Borden was available to work on the job (R. 62, 63); and in answer to Special Issue No. 5, that Local 100 refused to allow Borden to work on the job (R. 63); and in answer to Special Issue No. 6 that, under the rules of Local 100, Borden was entitled to work on the job (R. 64). The pertinent provision of the Constitution of the United Association is:

> Traveling Members to Report to Local Officers.
>
> Sec. 171. "Any member of the United Association accepting employment under the jurisdiction of sister Locals before reporting to the proper officer of such Local Union and depositing his clearance card, informing him of his intention of accepting employment under the jurisdiction of said union, shall be assessed a sum not to exceed $25.00" (Plf's Ex. No. 7; R. 332 at 342).

And pertinent provisions of the Constitution and By-Laws of Local 100 are:

> By-Laws, Article I.
>
> Sec. 30. "Members shall not solicit work from any contractor or their representative. All employment must be procured through Business Office of Local Union No. 100. Violation of this section subject to assessment of not less than five dollars ($5.00). Job Stewards, Foremen or Superintendents not reporting

these violations will be subject to an assessment of not less than five dollars ($5.00)."

Sec. 31. "Continued failure to comply with the Constitution and By-Laws of this Local Union shall render its members liable to suspension or expulsion, as three-fourths members may decide at any meeting" (Plf's Ex. No. 6; R. 324 at 329).

Sec. 34. "Any member who shall violate any of the laws of this Local . . . shall be subject to an assessment not less than $25.00 or expulsion" (Plf's Ex. No. 6; R. 324 at 330).

Borden, not being referred to the bank job under the provisions of the By-Laws of the Union, could not accept the job directly from Farwell since to do so would have been in violation of Section 30, Article I of the By-Laws. Acceptance of the job by Borden without obtaining the employment through Local 100 would have subjected him to disciplinary action, including expulsion, under Section 31. That this action was contemplated by the union is evidenced in the Executive Board meeting of the union convened to discuss Borden's complaint (R. 131). Borden chose to abide by the plain wording of the By-Laws and did not request the job from Farwell without union sanction (R. 106).

Borden, in joining the unions, agreed to be bound by the Constitution and By-Laws and Rules and Regulations thereof. By becoming a member he accepted certain duties and obligations and the unions, on the other hand, also accepted duties and obligations to him. Implicit in the contract is the implied agreement by the union to deal fairly and equally with the members. By joining the unions Borden was not agreeing to subject himself to arbitrary, willful and malicious wrongs such as here committed by the

union. Acceptance of the job by Borden in this case would have subjected him to internal disciplinary action by the union, including expulsion. Whether or not the union would have committed an unfair labor practice by seeking Borden's discharge after he had been employed is not in issue and, indeed, any consideration of this possible action would be rank speculation. That the union would have expelled Borden is not speculative but was, in fact, expressed by its Executive Board to be the intention of the union (R. 131). Had this complete severance taken place it could hardly be argued that state jurisdiction would not lie for Borden's reinstatement and damages for breach of contract. *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

The union then is saying that Borden should have taken the job with Farwell without union referral so that, after he had been expelled from the union, he could bring his action in the state court. To impose such a burden on the right to judicial relief would be to invite flagellantism of the worst kind.

The crux of the union's contention is that a suit to enforce internal union rights by contract after expulsion differs from the situation here at hand. It is submitted that this interpretation of *Gonzales* is too narrow and restricted and was not intended by this Court in that decision. By expulsion in the *Gonzales* case, Gonzales lost his right to be referred to jobs by the union equally with other members. His suit, along with reinstatement, sought damages for his inability to secure work and the refusal of the union to refer. No distinction could be drawn between that case and an identical case based upon damages for loss of rights through wrongful suspension. In either of these events the member has lost his valuable union rights, the only distinction being possibly that the suspension would

not be permanent. Borden sees his situation in no different light. He has been denied wrongfully, maliciously and arbitrarily, his valuable union rights, i.e., to be referred to the bank job as was the practice of the union, by the simple expedient of refusing to issue a job referral sending him to the job site. In any of these situations: expulsion, suspension, simple refusal to refer (observe union rights), the result is the same. The member has lost his valuable union right to be treated equally and fairly in accordance with the rules and practices of the union. To draw a distinction in such a case is to torture the ruling in *Gonzales*.

In *Gonzales*, when considering an action in contract in the state court, this Court said:

> "But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by Federal law and indeed the assertion of any such power has been expressly denied. The provision to 8(b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein'. . . ."

Thus it is recognized that the Act does not purport to regulate internal union affairs. In actions brought for the enforcement of such union rights jurisdiction of the State Courts has not been displaced. The Court also observed in *Gonzales* that the action was between the union and a member of the union and that Gonzales did not complain of the actions of any employers in refusing to employ him as the result of the termination of his union membership, and in this vein the Court stated (356 U.S. 617 at 622, 623):

> "The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring

about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice in §8(b)(2). . . . The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms. Isaacson, Labor Relations Law: Federal versus State Jurisdiction, 42 A.B.A.J., 415, 483."

This holding by the Court is particularly appropriate. Borden does not complain of any action of the union directed at Farwell. His suit in contract looks solely to the action of the union against him. The state court proceeding, as is seen by Special Issue No. 6 (R. 64) inquired into whether Borden was entitled to work on the bank project under the rules of Local 100.

We would also show that the distinguished Amicus Curiae, Mr. J. Albert Woll, has heretofore recognized the right of a union member to bring suit against his union in contract in state courts. When addressing himself to Title I of the Labor Management Disclosure Act, 29 U.S.C. §411-415, he stated:

"Organized labor has not the slightest quarrel with the notion that union members should be accorded the basic rights set forth in the 'Bill of Rights'. Indeed, union constitutions, enforceable in state courts under traditional contract law principles, invariably contain such rights in one form or other." (J. Albert Woll, *Labor's "Bill of Rights": Symposium on the Labor-Management Reporting and Disclosure Act of 1959*, Ralph Slovenko, Editor.)

B. State Court Has Jurisdiction of Tort Action.

Again assuming, for purposes of argument only, that the union has committed an unfair labor practice, the jurisdiction of a state court has not been displaced by the Labor Management Relations Act of 1947. This Court has previously upheld such state court jurisdiction in *Allen-Bradley Local No. 111, United Electrical Workers of America Employment Relations* v. *Wisconsin Employment Relations Board*, 315 U.S. 740; *United Construction Workers, Affiliated with United Mine Workers of America, et al.* v. *Laburnum Construction Co.*, 347 U.S. 656; and *United Automobile Workers* v. *Russell*, 356 U.S. 634.

While the court found exclusive jurisdiction under the Federal Act in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, pre-empting state jurisdiction of a tort action, that case is not pertinent to the situation at hand. In *Garmon* the state had declared through a state labor act the action of the union engaging in peaceful picketing to be a tort. Certainly a state may not, either before or after the passage of the Federal Act, interfere with the central purposes of the Federal law. To allow state interference in such an instance would be tantamount to destruction of the existence of a federal government and its laws.

Texas has passed no labor-management act on which Borden relies. His action is based on the Texas Right to Work Law (Article 5207a, Revised Civil Statutes of Texas) specifically allowed by Sec. 14(b) of the Labor Management Disclosure Act of 1959, and common law tort and contract principles. This Court had this identical question before it in the *Laburnum* case, wherein at the outset the Court, in stating the union's position, there said (at p. 663):

". . . that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. The latter exclusion is the issue here."

The Labor Management Relations Act established the NLRB primarily for the purpose of forestalling unfair labor practices and the theme of the Act is preventive. The Court took cognizance of the purpose of the Act in answering the argument that state legal responsibilities of unions had not been displaced in *Laburnum*, where it held (at p. 666):

"The 1947 Act has increased, rather than decreased, the legal responsibilities of labor organizations. Certainly that Act did not expressly relieve labor organizations from liability for unlawful conduct."

The holding has support in the Congressional history of the Act. Senate Report No. 105, 80th Cong., 1st Sess. 50, concerning S. 1126, after speaking of committee hearings concerning union coercion, threats of reprisals and mass picketing and violence, said in part:

"Some of these acts are illegal under state law, but we see no reason why they should not *also* constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act." (Emphasis added.)

Later the Court had a more identical question before it in the *Russell* case where, in setting out the question, the Court said (at p. 635):

"The issue before us is whether a state court, in 1952, had jurisdiction to entertain an action by an employee,

> who worked in an industry affecting interstate commerce, against a Union and its agent, for malicious interference with such employee's lawful occupation."

It was assumed in *Russell* that the action of the union constituted a violation of 9(b)(1)(A).

The Court, in rendering its opinions in *Laburnum* and *Russell*, found Congressional intent not to be implied in pre-empting state jurisdiction of actions involving common law torts, the Court recognizing that it was the intent of Congress, by the establishment of the unfair labor practices against union conduct, merely to remove from the protected area of the Act activities which Congress had determined as illegal. The Court thus recognizes that Congress did not intend to deny existing rights under state law, thereby removing rights already granted individuals under common law. This holding of the Court was succinctly stated in *Laburnum* when the Court said (at pp. 663, 664):

> "Here Congress has neither provided nor suggested any substitute for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery would deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct."

It is just such an unfair and unjust result as denied by the Court in *Laburnum* and *Russell* which the union here seeks. There is no question in this case but that the conduct of the union, being willful and malicious in wrongfully interfering with Borden's inherent right to work and making threats to Borden, constituted a tort under Texas law. No issue is here raised by the union that its conduct was not wrongful and tortious, the sole issue submitted being that

the conduct, being arguably an unfair labor practice, although a breach of contract and a tort, is pre-empted by the Federal Act. The result which the union seeks here is a grant of immunity from its wrongful conduct as a right under the Federal Act, and the enunciation of a legal principle which will assure others who engage in such conduct, either immunity or at least escape from the full consequences of their action.

C. Matters Here Involved Are No More Than of Peripheral Concern to the Act.

Again assuming, arguendo, that the conduct here involved constitutes an unfair labor practice, it is of minor importance to the Federal regulatory scheme. The Court recognized or assumed an unfair labor practice to be involved in *United Construction Workers, Affiliated with United Mine Workers of America, et al.* v. *Laburnum Construction Co.*, 347 U.S. 656; *United Automobile Workers* v. *Russell*, 356 U.S. 634; and *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

However, in each such case the Court held that, although the conduct there may have come within the jurisdiction of the National Labor Relations Board, the activities there involved were not such as were exclusively within the jurisdiction of that administrative body.

As the Court recognized in *Laburnum*, the Labor Management Relations Act of 1947 primarily sought to *prevent* unfair labor practices and industrial strife. One of the principal themes of the pre-emption doctrine is to avoid conflicting decisions by the state or federal courts on the one hand and the Labor Board on the other, as to whether conduct which was viewed by one forum as legal might in another forum be held illegal.

"Our cases which hold that state jurisdiction is pre-empted are distinguishable. In them we have been concerned lest one forum would enjoin, as illegal, conduct which the other forum would find legal, or that the state courts would restrict the exercise of rights guaranteed by the Federal Acts." *International Union, etc.* v. *Russell*, 356 U.S. at p. 644.

Clearly a protected activity, as declared by Congress, would be of central concern to the Act. Further, those unfair labor practices prohibited by the Act, for which traditional state remedy is provided, would also be of primary concern to the Act. Where the state has assumed jurisdiction of activities which reasonably come within the protected and concerted activities allowed by Congress, the Court has found state jurisdiction to be pre-empted. *United Automobile Workers* v. *Russell*, 356 U.S. 634; *Local 111, United Electrical Workers* v. *Laburnum Construction Co.*, 347 U.S. 656; *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

Certainly a different case is presented where there is no possibility that the state courts and the Board may conflict in deciding whether or not the conduct is legal and permitted by the Act. In these cases where a state court has assumed jurisdiction to award full redress for past conduct amounting to a breach of contract or the commission of a tort it has been held that mere coincidence between the facts giving rise to the state court proceeding and a possible action before the National Labor Relations Board is not so compelling under the Act as to deny state jurisdiction and full redress to the injured party. In such an event the court in *Gonzales* held (at p. 621):

"If, as we held in the Laburnum case, certain state causes of action sounding in tort are not displaced

simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not to be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member."

One of the principal concerns of the Court in finding state jurisdiction not to be pre-empted in such cases has been to carry out the true intent of Congress in promoting justice and democracy and to prevent tortured implications of the Act to deny individual justice.

The Act did not establish a general scheme of allowance of full damages for injuries caused by past wrongful conduct, be it in tort or in contract. *United Automobile Workers* v. *Russell*, 356 U.S. 634; and *United Construction Workers, Affiliated with United Mine Workers of America, et al.* v. *Laburnum Construction Co.*, 347 U.S. 656. In examining Sec. 19(c) of the Act, which includes the authority of the Board to award back pay, the Court in *Russell* held that the grant of authority of the Board therein contained was not exclusive and said (at p. 642):

"This section is far from being an express grant of exclusive jurisdiction superseding common law actions, by either an employer or an employee, to recover damages caused by the tortious conduct of a union.

> To make an award, the Board must first be convinced that the award would 'effectuate the policies' of the Act. 'The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act.' Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 198, 61 S.Ct. 845, 854."

Again in *Gonzales* the Court held (at p. 621):

> "The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although, if the unions' conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct any damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of valuable state remedies for all damages suffered. International Union, United Automobile Workers v. Russell, 356 U.S. 634, 78 S.Ct. 932."

It is our view that the application of the pre-emption doctrine to a case involving conduct such as suffered by Borden would grant substantial immunity to labor unions for their wrongful conduct cutting off the right of full redress provided under traditional law principles and substituting therefor the mere possibility of a partial relief by an administrative body looking not to the individual and his damages but to the administration of a Federal Act which is only incidentally concerned.

III.

Examination of Gonzales and Garmon in Light of Labor Management Disclosure Act of 1959.

At the outset we submit that *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, has been misinterpreted by the union. *Garmon*, it would appear, is merely a recognition and clarification of the doctrine first enunciated in *Garner, et al.* v. *Teamsters, etc.*, 346 U.S. 485. The activity in issue in *Garner* was potentially protected under the Act but prohibited by state law. The Court, finding that a conflict in remedies existed in the event that both the State and the NLRB found the activity condemned, could issue the same relief. In declining to decide whether or not the activity was protected or prohibited the Court declared the duty of primary decision lies with the Board.

Then in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, a peaceful picketing case also, the Court in reaffirming the *Garner* doctrine held (at p. 480):

> "Obvious conflict, actual or potential, leads to easy judicial exclusion to state action."

There the complaint had alleged unfair labor practices and it was clear that the activity complained of was within the central theme of the Act and the Court stated (348 U.S. at p. 481):

> "*But where the moving party itself alleges unfair labor practices,* where the facts *reasonably* bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be *reasonably* deemed to come within the protection afforded by that Act, the state court

must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance." (Emphasis added.)

Then in *Garmon* the *Garner-Weber* doctrine was reaffirmed in a case again involving peaceful picketing, the Court stating (at page 244):

> "*When it is clear or may fairly be assumed* that the activities which a state purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield." (Emphasis added.)

and further when the Court stated (at p. 245):

> "When an activity is arguably subject to §7 or §8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . "

It is the last word "arguably" on which the union seizes, interpreting *Garmon* to mean that if it can be argued at all that an activity was protected or prohibited (without regard as to whether the argument be reasonable or not), then state jurisdiction must be pre-empted. Such an interpretation could hardly be justifiable when viewing the previous rulings of the Court and, indeed, other language in *Garmon*, and it is particularly significant that in *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, at p. 617, the Court dismissed illogical argument in inferring activities under the Act when it was held:

> "Since we are dealing with implications to be drawn from the Taft-Hartley Act for the evidence of conflicts between enforcement of federal policy by the National

> Labor Relations Board and the exertion of state power, it might be abstractly justifiable, as a matter of *wooden logic*, to suggest that an action in a state court by a member of a union for restoration of his membership rights is precluded." (Emphasis added.)

Any lingering doubts as to the intention of the Court in *Garmon* when proclaiming that activities "arguably" subject to the Act are pre-empted have been resolved by the Court in *Marine Engineers Beneficial Association, et al.* v. *Interlake Steamship Co.*, 370 U.S. 173, at p. 182, wherein the Court said that state courts could cede jurisdiction in a case in which pre-emption has been raised:

> "whenever a *reasonably* arguable case is made to that effect." (Emphasis added.)

The union argues that *Gonzales* must be re-examined in the light of the *Garmon* case. Here the contention is that the court in its holding in *Garmon* has in effect overruled the rationale of *Gonzales*. Only a cursory examination of the opinion in *Garmon* shows that the Court specifically upheld its previous holding in that case. Then the union would contend that, although the doctrine that state courts have jurisdiction of matters of peripheral concern to the Act, such matters should be referred to the Labor Board in the first instance. It is apparent that learned counsel here misses the underlying and supporting foundation of that holding. The Court assumed in *Gonzales*, as well as in *Laburnum* and *Russell*, that the matters there involved were within the jurisdiction of the Board, but held that the matter was not within the *exclusive* jurisdiction of that administrative agency, the theory behind this doctrine being that when matters were of great concern to the states, or of peripheral concern to the Act, there was no basis for implying exclusive jurisdiction. If the union agrees that the

Gonzales case is sound in its rationale that matters of peripheral concern should come within the jurisdiction of the state courts, what possible object could be achieved by first referring these matters to the Labor Board for a determination? In matters of peripheral concern to the Act the Court recognizes, in *Gonzales*, that to deny state jurisdiction in favor of the Labor Board would, in effect, grant the wrongdoer a right not intended by Congress to escape the full consequence of such wrongful conduct under state law.

Assuming a matter to be of peripheral concern to the Act, does the union suggest that in referring such matters to the Labor Board it has expertise in traditional concepts of contract and tort law and its application in all fifty states? The Labor Board is not presumed to have expertise except in the labor field. To suggest that matters of peripheral concern to the Act be first referred to the Board is to suggest that the body of common law of all fifty states be submitted to that administrative agency. It can hardly be argued that Congress intended such an incredible result.

Further it is submitted that *Garmon* should be reexamined in the light of Congressional intent, as expressed in the Labor-Management Reporting and Disclosure Act of 1959. A "No-Man's Land" was created in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1. In that case it was determined that the Congressional intent to provide centralized administration in the Labor Management Act of 1947 was so compelling that states must decline jurisdiction in matters under the Act even though the Board had refused to act. The holding in *Garmon* was in a large sense based upon *Guss*.

Congress has shown in the 1959 Act that its past intent and certainly its present intent is that centralized ad-

ministration of labor relations is not of such paramount importance as to deny individual rights and remedies provided by state law. In Sec. 701 of the Act of 1959 Congress, 73 Stat. 519, 29 U.S.C. 401, *et seq.*, ceded to state and federal tribunals those matters beneath the monetary jurisdictional standards of the Board. Further, in Sec. 103 and Sec. 603 of the Act, Congress specifically recognized and approved the jurisdiction of state courts to grant relief from wrongful conduct.

Although certainly centralized administration of labor relations has been maintained, it is submitted that the presently expressed intent of Congress is that it shall not be of such overwhelming significance that wrongful conduct may not be dealt with by state courts under state laws. Thus, *Garmon* should be examined in light of this later Congressional intent.

Conclusions

Where a suit is solely against a union in the state court by a member of that union seeking redress for wrongs committed against him in violation of state law, no unfair labor practice should be inferred. Where the union member has no complaint against the employer and there is no showing that the union caused, or attempted to cause, the employer to discriminate, no inference of an unfair labor practice can be drawn.

The Federal Acts are concerned in the main sense in preventing unfair labor practices and industrial strife. To pre-empt the jurisdiction of the state courts in a suit involving purely the state law, not aimed in any sense at the regulation of labor-management relations, would cause unjust and harsh results. Although the sweep of the Federal law is broad, it is not all inclusive and, where matters

are of peripheral concern to the main purposes of the Federal law, compelling state interests and individual rights should not be denied.

Congress did not intend the labor Acts to operate in such a manner as to preclude state courts and grant to an administrative agency control over contract and tort law of the various states. Surely a more compelling Congressional intent than has been heretofore expressed by Congress would be necessary before arrival at such an incongruous result.

It is respectfully submitted that the judgment of the Court below should in all respects be affirmed.

Respectfully submitted,

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April 2, 1963.

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APPENDIX

The relevant portions of the Labor Management Relations Act, of 1947 (61 Stat. 136, 29 U.S.C. 141, *et seq.*), are as follows:

• • • • •

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

• • • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representatives of the employees as provided in

section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure

to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by an action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8 (a) (3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be

amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue al-

leging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

* * * * *

The relevant portions of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 401 *et seq.*) are as follows:

§ 103. Retention of existing rights

Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

§ 603. Retention of rights under other federal and state laws

(a) Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

* * * * *

§ 701. Federal-state jurisdiction

(a) Section 14 of the National Labor Relations Act, as amended,[25] is amended by adding at the end thereof the following new subsection:

"(c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category

of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

"(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

• • • • •

The relevant Texas Statutes are:

"Art. 5207a. Right to bargain freely not to be denied; membership in labor union:

"Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

"Sec. 2. No person shall be denied employment on account of membership or nonmembership in a labor union.

"Sec. 3. Any contract which requires or prescribes that employees or applicants for employment in order to work for an employer shall or shall not be or remain members of a labor union, shall be null and void and against public policy. The provisions of this Section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to

any new agreement or contract executed after the effective date of this Act.

"Sec. 4. Definitions. By the term 'labor union' as used in this Act shall mean every association, group, union, lodge, local, branch or subordinate organization of any union of working men, incorporated or unincorporated, organized and existing for the purpose of protecting themselves and improving their working conditions, wages or employment relationships in any manner, but shall not include associations or organizations not commonly regarded as labor unions.

"Sec. 5. If any clause, sentence, paragraph or part of this Act, or the application thereof to any person or circumstances, shall for any reason be adjudged to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act and the application thereof, but shall be confined in its operation to the portion of the Act directly involved in the controversy in which judgment shall have been rendered and to the person or circumstances involved. Acts 1947, 50th Leg., p. 107, ch. 74."

* * * * *

Art. 5154g, R.C.S.

Section 1. It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion.

* * * * *

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No. 541

In the

Supreme Court of the United States

OCTOBER TERM, 1962

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES,
Petitioner,

v.

H. N. BORDEN,
Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

REPLY BRIEF FOR PETITIONER

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I. Misconstruction of Facts by Respondent

1. Respondent contends "[t]his is not a wrongful hiring hall * * * case." (Resp. Br., p. 3.) Yet, he characterizes his complaint as follows:

> "He has been denied wrongfully, maliciously and arbitrarily, his valuable union rights, i.e., to be referred to the bank job as was the practice of the union, by the simple expedient of refusing to issue a job referral sending him to the job site." (Resp. Br., p. 25.)

2. Although respondent contests petitioner's statement that the jury found against Borden on his claim of denial of membership rights (Special Issue No. 3, R. 63), respondent admitted that he was and still is a member of Local 100 (Resp. Br., p. 6 and ¶ II of Amended Petition, R. 11).

3. Petitioner alleges that he "never did go to the project and ask for a job from Farwell" (Resp. Br., p. 8), and that "He never requested employment directly of Farwell * * *" (R. 19), however, plaintiff's witness, job foreman Thurman, testified:

> "Mr. Borden called me and told me he was here in town and wanted to know if I had a place I could use him, and I said, 'Yes, if you get a referral, come on down.'" (R. 144.)

4. Respondent rejects the four possible reasons advanced by petitioner for refusing to refer Borden, but suggested that

> "Thurman's testimony furnishes another reason. Lanham told him that Borden was not going to work on the bank because 'he shoved his card down our throat.' (p. 145) Thus, the reason was because Borden was trying to exercise his union rights."

We submit that such reason is the same as petitioner's reason number (2): Union policy of favoring Dallas residents; but in any event, it is a reason encompassed within the scheme of the National Labor Relations Act, and a reason which in the final analysis would have to be determined and evaluated by the N.L.R.B.

5. Throughout its brief, respondent alleges that "The union was not a certified bargaining agent." (Resp. Br., pp. 11, 2, 20.) Whether it was certified under Section 9(c) of

the Act or merely a representative of a majority of the employees in an appropriate unit under Section 9(a) is of course immaterial.

6. Respondent alleges that he

> "* * * does not complain of any illegal hiring hall system or action of Farwell * * *" (R. 10),

that

> "No attempt was made to cause a prospective employer to discriminate against Borden for the purpose of encouraging or discouraging union membership. The prospective employer was not a party to the suit nor was it involved in any way * * *" (R. 12),

and that

> "The action of the union in refusing to refer Borden was unilateral. No showing is made as to any effect on Farwell." (R. 17.)

Yet Borden himself testified: "I was working for the company and was coming in here to still continue to work for the company * * *" (R. 84); the jury found that Farwell had promised Borden a job (R. 62, Resp. Br., p. 22); and the Court of Appeals gave this summary of what happened next:

> "In the meantime, according to A. G. Thurman, foreman of the Bank project, *Borden had called him, stating that he was in town, desiring a job* and had placed a clearance card with Local 100. Thurman saying 'if you get a referral come on down' that *he (Thurman) later called Lanham requesting that Borden be referred to the Bank project*, to which Lanham replied 'I am not about to send that old S-O-B down there. He shoved his card down our throats and I am not about to send him to the Bank.
>
> * * * * *

"It is rather difficult to follow appellants' argument that 'Lanham had no duty to refer Borden to the job site requested' in view of its established policy, that once a request is made by an employer for a specific employee, that person is immediately referred to the job site. That *this was the uniform practice* is explicit in the testimony of foreman Thurman; he stating that in obtaining employees he would place calls with Local 100 which is 'the end of my obligation in getting a man on the job'; further testifying that *all employees hired by him came through the union office*; answering 'No, Sir' to the question 'Have you ever hired anyone on the job except through Union referral, as is the custom here'; and the record as hereinabove narrated, in our opinion constituted *sufficient proof that respondent was willfully denied a job opportunity to which Lanham knew he was entitled* to under the rules and procedures established by petitioners for allocating work among their members." (R. 353, 354, emphasis added.)

7. Respondent's unsupported reference to "abusive threats made to Borden that put him in fear of bodily harm . . ." (Resp. Br., p. 15) refers to events which occurred a full year after the union refused to refer him to the bank job, after that job was already completed (R. 353), and after he had employed an attorney and threatened a law suit (R. 130-131, R. 136).

II. Respondent Misconceives the Scope of Sections 8(b)(1)(A) and 8(b)(2) of the Labor Management Relations Act

Respondent makes his stand on the proposition that the union's conduct did not violate the federal statute (Resp.

Br., p. 16). He applies a literal and limited reading of Section 8(b)(2) to conclude:

> "In the absence of a union right or supposed right of control, *under a collective bargaining agreement* enforced against the employer *by a certified bargaining agent, or threat by a union against the employer*, in either event causing employer discrimination to encourage or discourage union membership, there is no Sec. 8(b)(2) violation." (Resp. Br., p. 20, emphasis added.)

This view of course ignores *Radio Officers', 347 U. S. 17 (1954)*, and a long list of NLRB and court decisions, many of which are cited in our original brief (Footnote 23). If respondent is right in his contentions of fact, then the union's refusal to refer him to the bank job was certainly because he engaged in protected concerted activity. As this Court wrote in *Radio Officers', 347 U. S. 17, 31*:

> "Thus the Board concluded that the union, by refusing to clear Fowler in both February and April, restrained and coerced Fowler in *his statutory right to refrain from observance of the union's rules*, and caused the company to discriminate against Fowler by denying him employment." (Emphasis added.)

But respondent's misconception as to the scope of the federal proscription is no more at variance with settled law than is the view of the Texas Court of Appeals whose opinion casually dismissed petitioner's pre-emption argument with this observation:

> "By plain wording of the Act, the discrimination must be limited to purpose of encouragement or discouragement of membership in the union and plaintiff was already a member." (R. 351.)

At the risk of belaboring the obvious, petitioner has appended two recent and yet unpublished NLRB decisions which illustrate that Borden's hiring hall complaint is common grist for the NLRB mill: *Local 568, Hotel Employees Union (Warwick Hotel), 141 NLRB No. 29*, March 11, 1963 (Appendix A, attached hereto), holding that a union violated Section 8(b)(2) by refusing to refer a suspended member to an employer who has a "practice" of calling the union for employees; *Operating Engineers Local 624 A-B (D. S. McClanahan & Son), 141 NLRB No. 57*, March 20, 1963 (Appendix B, attached hereto), holding that a union violated Section 8(b)(1)(A) and 8(b)(2) when the employer, not a party to the case, failed to employ a dissident union member whom the union had refused to refer, where there was a "general practice to call the respondent for men and to require that they produce a referral slip as a condition to obtaining work. * * *" In the latter case, the Board required no overt act by the employer, but held the union's conduct in refusing to refer the dissident member to be an unfair labor practice because the member had "engaged in protected concerted activities, i.e., his opposition to incumbent officials of Respondent. * * *"

Whether petitioner in fact was guilty of violating these Sections is a determination which only the Labor Board is authorized to make. Neither the Texas Court nor this Court has statutory power to make that finding. Clearly, however, the activity herein is "arguably subject to § 7 or § 8 of the Act" and in no sense peripheral to the area which the Act regulates. If the conduct was not an unfair labor practice,

then it is all the more reason for the state courts to avoid regulation herein. Since "Congress has adopted a selective system for dealing with evils, the Board is confined to that system. * * * Where, as here, Congress has aimed its sanctions only at specific discriminatory practices [affecting hiring halls], the Board cannot go further and establish a broader more pervasive regulatory scheme." *Teamsters Local 357 v. NLRB*, 365 U. S. 667, 676. And of course the state courts cannot go further either.

Respondent has inadvertently pointed up the rationale of federal pre-emption when he asks:

> "Assuming a matter to be of peripheral concern to the Act does the union suggest that in referring such matters to the Labor Board it has expertise in traditional concepts of contract and tort law and its application in all fifty states?" (Resp. Br., p. 37.)

In the first place, the matter herein cannot be of peripheral concern, for the state court has regulated no conduct save that which the Labor Board is empowered to regulate. Secondly, if the Labor Board's remedy is different, it but emphasizes the danger inherent in a doctrine that would permit fifty different states to apply their respective expertise to a matter as to which Congress has decreed uniformity both as to remedy and as to forum.

III. Section 14(b) is No Part of This Case

Respondent now alleges that his action is in part "based on the Texas Right to Work Law (Article 5207a, Revised Civil Statutes of Texas, specifically allowed by Sec. 14(b) of the Labor Management Disclosure Act of 1959 (sic). * * *"

(Resp. Br., p. 27,) Section 14(b) of the Labor Management Relations Act of 1947 is no part of this case. The Texas' appellate courts have not treated this case as an action based on state statute. The Texas Court of Appeals held that Borden's "case is based on allegations involving both tort and contract" (R. 348); and made no mention of the Texas "Right-to-Work" statute. And at page 15 of his brief, respondent advises that "This is an action under state law sounding both in contract and in tort." In addition, there were no jury special issues to support a violation of the so-called "Right to Work Law."

If Article 5207(a) of the Texas statutes were involved,[1] it could only be Section 1 thereof, which does not meet the requirements of Section 14(b) of the federal statute but rather relates to individual and collective bargaining, subjects which are clearly pre-empted by Sections 7 and 8 of the federal statute.

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[1]The Texas statute contains three operative sections, viz:

"Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

"Sec. 2. No person shall be denied employment on account of membership or nonmembership in a labor union.

"Sec. 3. Any contract which requires or prescribes that employees or applicants for employment in order to work for an employer shall or shall not be or remain members of a labor union, shall be null and void and against public policy. The provisions of this Section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to any new agreement or contract executed after the effective date of this Act."

Sections two and three could not be relevant in this case; for (2) relates to denial of employment on account of membership or non-membership in a labor union; and Borden was a union member; and (3) makes void as against state public policy certain contracts. But as respondent acknowledges (Brief, p. 10) there is no attack upon the contract.

In any event, this case exemplifies the note of warning issued by the dissenters in the *Gonzales* case *(356 U. S. 617, 632)*:

> "• • • the presence or absence of pre-emption is a consequence of the effect of state action on the aims of federal legislation, not a game that is played with labels or an exercise in artful pleading."

IV. Respondent Misconstrues GONZALES and GARMON

Respondent asserts that "Only a cursory examination of the opinion in *Garmon* shows that the Court specifically upheld its previous holding in the • • • [*Gonzales*] case." (Resp. Br., p. 36.)

If the examination is more than cursory it appears that in *Garmon, 359 U. S. 236 (1957)*, the majority directly referred to *Gonzales, 356 U. S. 617 (1958)*, only twice. First, to emphasize the "Delphic nature" of the problem, *359 U. S. at 241*, and second, to note an exception to the rule of pre-emption "here the activity regulated was a merely peripheral concern of the Labor Management Relations Act." *359 U. S. at 243-244.*

That which was held in *Gonzales* to be "peripheral" to the federal scheme of regulation was controversy between member and union as to expulsion from union membership. Borden's case is different; he seeks no reinstatement in the union, for he acknowledges he is a member (Brief, p. 6, footnote 13, "it is admitted that he was a member of Local 100 and that his clearance car had been accepted on October 9,

1953." Borden's complaint concerns only union interference with his employment by Farwell; a matter central to the federal regulatory scheme.[2]

Accordingly, this dispute is for federal, not state, determination. Alternatively, it is, at least, for *initial* federal determination, else the states play havoc with the federal regulation. See our original brief, pp. 30ff.

If, after a federal determination that the questioned conduct is on the periphery of the federal regulation, such conduct may then be regulated by the states (e.g. violence, as in *Laburnum*; or restoration to membership, as in *Gonzales*) there yet remains the danger that the state remedy may subvert the federal purpose. For *Garmon* observed (in denying California the power to award damages for conduct that the federal Act permitted the federal tribunal to restrain only) that:

> "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *359 U. S. at 247.*

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[2] The majority in *Gonzales* was focusing upon the central problem in Gonzales' case—the reinstatement to union membership of a member wrongfully expelled. Damages were there viewed as incidental to the primary remedy of reinstatement. The Court then considered the propriety of the state's power to "fill out the remedy," 356 U. S. at 620-621. The majority ignored the circumstances which gave rise to damages for loss of wages (although the dissent discussed this aspect, 356 U. S. at 626-627) and referred to the possible violation of the federal law only in conjectural terms; viz: "In such a suit there *may be* imbedded circumstances that *could* constitute an unfair labor practice under 8(b)(2) of the Act." *356 U. S. at 619.* (Emphasis added.)

[3] *United Construction Workers v. Laburnum, 347 U. S. 656 (1954).*

[4] *Laburnum* and *Garmon* recognized as much for this court was careful to note in *Garmon* that in *Laburnum* the state afforded redress for the violent conduct (an activity subject to state regulation) *only to the extent of awarding "damages directly and proximately caused by wrongful conduct (violence) chargeable to the defendants"*; and emphasized that "* * * *there is nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct.*" *359 U. S. at 249*, footnote 6. (Emphasis added.)

Accordingly, if there remains vitality to *Gonzales*, and if a state may award damages with respect to conduct at the periphery of the federal regulation, the remedies which the states may impose for such conduct should be limited to compensation for the activity which the state may control. Otherwise, as in the instant case, where the state awards Borden his actual damage doubled by a "smart money" award, the state remedy becomes "a potent method of governing conduct and controlling policy."

Respectfully submitted,

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APPENDIX A

141 NLRB No. 29 D-5194 Philadelphia, Pa.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 4-CB-800

LOCAL 568, HOTEL, MOTEL & CLUB EMPLOYEES UNION, AFL-CIO

and

SYDNEY AXELROD, An Individual

and

WARWICK HOTEL, INC.,

Party to a Contract

DECISION AND ORDER

On October 18, 1962, Trial Examiner Sydney S. Asher, Jr., issued his Intermediate Report in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices and had not engaged in others and recommending that it cease and desist from the unfair labor practices found and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter Respondent and General Counsel filed exceptions to the Intermediate Report and briefs in support of their exceptions.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in the case and finds merit in General Counsel's exceptions. Accordingly, the Board adopts the Trial Examiner's findings, conclusions, and recommendations only to the extent that they are consistent with the following:

1. General Counsel alleged in his complaint that Respondent caused hotels in the Philadelphia area to refuse to employ Sydney Axelrod as an extra banquet waiter in violation of Section 8(b)(2) of the Act by virtue of an unlawful arrangement, understanding, and practice between Respondent and the hotels requiring that such waiters be referred to jobs or cleared for employment by Respondent as a condition of employment, and the refusal of Respondent either to refer Axelrod to jobs or approve his employment by the hotels. The Trial Examiner rejected this allegation and found that, although the hotels did generally use Respondent's facilities for recruiting extra banquet waiters and did refuse to employ Axelrod in the absence of referral by Respondent, the practice was not violative of Section 8(b)(2) because it was not "bilateral or caused by contractual compulsion, but was unilateral and voluntary, and was followed primarily because it suited the hotels' convenience." We do not agree.

For many years prior to October 1959, Respondent and hotels in the Philadelphia area were parties to collective-

bargaining agreements which provided specifically for a closed shop and exclusive hiring through Respondent. During this period, the hotels complied with the contract requirement and recruited extra banquet waiters in the first instance through Respondent's banquet department hiring hall. As the result of the Supreme Court's decision in *Hotel Employees v. Leedom*, 358 U. S. 99, the Board in July 1959 reversed its previous policy of not asserting jurisdiction over hotels and set forth the standards which would govern in the assertion of jurisdiction over such establishments.[1] Following this decision, Respondent and the hotels negotiated a new bargaining contract in October 1959 which eliminated the closed shop and exclusive hiring clauses and substituted therefor a statutory union-shop clause and a provision which reads:

> 2. When in need of employees, EMPLOYER may apply to the office of the UNION. Said UNION agrees, during the term hereof to, at all times, maintain an office in Philadelphia, which shall be open during ordinary business hours, and shall communicate to EMPLOYER the address of said office * * *.

In bargaining contracts with hotels which are not subject to the Board's jurisdiction, the pre-1959 closed shop and exclusive hiring provisions have been continued.

Despite changes in the 1959 bargaining agreement, and except for a 3-month period of confusion which followed the signing of the 1959 contract, the hotels have continued their former practice of hiring extra banquet waiters, with the possible exception of Negro waiters, only if they have been requested from, and referred by, Respondent. Thus, when the

[1] *Floridan Hotel of Tampa, Inc.*, 124 NLRB 261.

Charging Party, Sidney Axelrod, an experienced extra banquet waiter and longtime union member, was suspended from union membership and denied referrals from Respondent's banquet department hiring hall for alleged "dereliction of duty, embarrassment to the Union, causing internal strife, and publicizing the action of the Union to outsiders," several hotels refused to consider him for employment at his trade with the explanation that they obtained extra banquet waiters solely through Respondent.

Notwithstanding the statements made to Axelrod by several hotels in refusing to consider his application for employment, the Trial Examiner found that the pre-October 1959 exclusive hiring practice was no longer in effect. He predicated this finding on the testimony of Joseph P. Hoemig, general manager of five Philadelphia hotels, that there have been occasions since 1959 when at least two hotels have hired extra banquet waiters through the Committee on Human Relations. However, the instances of hiring through the Committee involved only Negro waiters. Hoemig's testimony was nothing more than that on a few occasions such extra banquet waiters had been recruited through the Committee when the customer had specifically asked that such waiters be employed. There is not the slightest evidence that this relaxation of the preexisting contract requirement and practice has been otherwise extended. This single exception does not prove that the practice of exclusive hiring through the Union has been abandoned. In fact, Hoemig's testimony considered in its entirety is to the contrary.[2]

[2] *N.L.R.B. v. Local 369, Hod Carriers*, 240 F. 2d 539 (C.A. 3); *Local 215, International Brotherhood of Electrical Workers*, 136 NLRB No. 137; *Nassau & Suffolk Contractors' Association, Inc.*, 118 NLRB 174.

Accordingly, we find, contrary to the Trial Examiner, that except on several occasions as heretofore indicated, the hotels have since October 1959 continued their former practice of hiring extra banquet waiters in the first instance exclusively through Respondent.

The Trial Examiner also found that, assuming the hotels had continued their former illegal practice of hiring exclusively through Respondent, the General Counsel had failed to establish that such rigid practice resulted from a bilateral understanding in which Respondent had participated or from pressure exerted upon the hotels by Respondent. In making this finding, the Trial Examiner relied upon the testimony of witnesses for the hotels and Respondent that there was no contractual obligation requiring the hiring of extra banquet waiters through Respondent. However, in order to establish equal responsibility of Respondent with the hotels for the latter's illegal practice of hiring only through Respondent, it is not necessary to establish an explicit agreement for such hiring. An understanding, even though not articulated, is sufficient to make the union responsible with the employer for the unlawful practice.

In accepting at face value the disclaimers by the participants in the alleged illegal understanding, agreement and

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Respondent's president, Stoltz, testified that the hotels had, beginning in early 1960, resumed their former practice of recruiting through Respondent. The Trial Examiner refused to credit Stoltz because he found him not a credible witness and his testimony was not corroborated by hotel officials.

However, the testimony as to the remarks made by hotel officials in refusing to consider Axelrod for employment does corroborate Stoltz. Hoemig's testimony, discussed above, treats of an exception; it does not serve to discredit the continuance of the preexisting practice. In these circumstances and for the reasons set forth, we believe Stoltz's testimony in this respect reflects the actual practice of the parties.

practice, the Trial Examiner failed to give proper weight to certain implications in the adduced testimony. It is no doubt true that it was convenient for the hotels to have a single source of supply for extra banquet waiters. But it does not follow that it was equally convenient for a hotel to reject a qualified waiter who applied directly to the hotel for a job at a time when a job was available. Significantly, in refusing to consider Axelrod's application for employment, the hotels made clear that they did so not because there were no jobs then available, but because referral from Respondent was a condition precedent to employment. Thus personal application for a job at any time, except in the contingency that Respondent could not supply necessary extra help, was a futility.

In evaluating the basis for this practice, the Trial Examiner also neglected to consider the origin of the practice. For many years the hotels had been required by contract to hire exclusively through, and to employ only members of, Respondent. In deleting the closed shop and exclusive hiring clauses from the 1959 contract, the parties inserted a provision which obviously contemplates that Respondent would continue to operate a hiring hall. The hotels subject to the Board's jurisdiction must have been aware that purely local hotels were still required to do their hiring of extra banquet waiters through Respondent. There is no evidence that in deleting the illegal hiring clause, Respondent took any steps to assure the employers that the illegal hiring practice was in fact abolished and that the employers were free to recruit extra banquet waiters from any source, subject only to the

lawful union-security requirement. When to these circumstances there is added the fact that Respondent had a rule prohibiting its members from working with union or nonunion members not booked through its hiring hall,[1] it is understandable why the hotels should have continued substantially unchanged the illegal practice of hiring only extra banquet waiters referred by Respondent.

We hold, contrary to the Trial Examiner, that the continuance after October 1959 of the hotels' practice of hiring extra banquet waiters in the first instance exclusively through Respondent was not solely voluntary, but was caused by an agreement or understanding with Respondent to con-

[1] The precise nature of the rule against working with other employees is in dispute. Axelrod and another witness for the General Counsel testified that at a union membership meeting in September 1961 a resolution was passed that members of the banquet department were not to work with nonunion members or with union members not booked through Respondent's hiring hall. Stoltz, president of Respondent, testified that each year a resolution is passed that members shall not work with other members of the banquet department if they have not obtained their employment through Respondent's hiring hall. According to Stoltz, the no-work resolution does not apply to working with nonunion members or suspended members who may have obtained their employment through other sources. The Trial Examiner credited the Stoltz version of the rule in large part because of Hoemig's testimony as to the employment of Negro waiters discussed above. Contrary to the Trial Examiner, we credit the version of the rule testified to by the witnesses for the General Counsel. We do so because this version is more in accord with customary union practice, and because on two occasions, in the fall of 1961, extra banquet waiters supplied by Respondent refused to work with both union and nonunion waitresses not booked through Respondent, which is consistent with the General Counsel's version of the rule. (The Trial Examiner refused to give probative weight to either of these incidents for reasons which we regard as invalid. The incidents are considered here as evidence corroborative of the General Counsel's version of the disputed union resolution.)

Even the Stoltz version of the rule would seriously handicap any hotel which tried to recruit waiters otherwise than through Respondent. This club over the hotels would be only slightly less potent in the Stoltz version than in the General Counsel version.

Although there is no direct evidence in this record that the hotels were aware of the union resolution, such knowledge is inferrable from the long standing relationship between the hotels and Respondent, the public nature of the resolution, its existence for a number of years, and the work stoppages.

tinue the preexisting practice which was reinforced by the knowledge that as a result of a union resolution waiters booked through Respondent would not work with waiters obtained elsewhere. We find, therefore, that by refusing for discriminatory reasons to consider Sydney Axelrod for referral as an extra banquet waiter, Respondent caused hotel employers to discriminate against him in hiring, thereby violating Section 8(b)(2) and (1)(A) of the Act.[5]

2. The General Counsel also alleged that Respondent had independently violated Section 8(b)(1)(A) of the Act by failing, in making job referrals, equally to represent Axelrod, a member of the bargaining unit for which Respondent was bargaining representative. The Trial Examiner found a violation substantially as alleged in the complaint. As we have found above that Respondent violated Section 8(b)(2) and (1)(A) of the Act, and the remedy for any further violation of Section 8(b)(1)(A) will be the same as for the violations already found, we consider it unnecessary to, and do not, pass upon this finding of an independent 8(b)(1)(A) violation.

The Remedy

Having found that Respondent engaged in certain unfair labor practices violative of Section 8(b)(2) and (1)(A), we shall direct that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.[6] We shall direct that Respondent restore

[5] *Local 215, International Brotherhood of Electrical Workers, AFL-CIO, 136 NLRB No. 137.*

[6] Member Rodgers, in addition to the provisions set forth in the Board's Order, would also specifically order the Respondent to cease and desist from continuing its unlawful hiring practices.

Sydney Axelrod to that position on the job roster of the banquet department to which he would be entitled if no discrimination had been practiced against him, and to refer him to jobs without discrimination. Respondent shall also make Axelrod whole for any loss of earnings suffered by him as the result of Respondent's unlawful conduct toward him by payment to him of a sum of money equal to that which he would have earned from on or about March 8, 1962, the date of the discrimination against him, until such time as his name is restored to the roster of the banquet department and he is referred to available employment without discrimination.[1] Loss of earnings shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289. Interest at the rate of 6 percent per annum shall be addedto moneys due Axelrod to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB No. 97.[2]

Additional Conclusion of Law

By removing Sydney Axelrod's name from the roster of the banquet department and by thereafter refusing to refer him to jobs as an extra banquet waiter with employers seeking such employees, including *inter alia*, members of The Philadelphia Hotel Association of Philadelphia, Pennsylvania, Respondent caused such employers to discriminate

[1] If after referral, any hotel, for reasons not caused by Respondent, would have refused to hire Axelrod, Respondent will not be obligated to reimburse him for loss of earnings suffered thereby.

[2] For the reasons stated in their dissenting opinion in *Isis Plumbing & Heating Co., supra*, Members Rodgers and Leedom would not award interest.

against him in violation of Section 8(a)(3) of the Act, and thus coerced and restrained employees in the exercise of rights guaranteed in Section 7 of the Act, thereby violating Section 8(b)(2) and (1)(A) of the Act.

ORDER

The Board adopts as its order the following in substitution for the "Recommendations" of the Trial Examiner.

Upon the entire record in the case and pursuant to Section 10(c) of the Act, as amended, the National Labor Relations Board hereby orders that Respondent Local 568, Hotel, Motel & Club Employees Union, AFL-CIO, Philadelphia, Pennsylvania, it officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause employers in the Philadelphia area, including members of The Philadelphia Hotel Association of Philadelphia, Pennsylvania, to refuse employment to Sydney Axelrod, or any other individual, in violation of Section 8(a)(3) of the Act.

(b) In any other manner restraining or coercing employees of employers subject to the Act in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Restore Sydney Axelrod to the employment roster of the banquet department, refer him therefrom for employment as an extra banquet waiter on a nondiscriminatory basis and make him whole for loss of earnings suffered as

the result of the discrimination against him, in the manner indicated in the section of this Decision and Order entitled "The Remedy."

(b) Post at its business offices, meeting, and hiring halls in Philadelphia, Pennsylvania, copies of the notice attached hereto marked "Appendix."* Copies of said notice, to be furnished by the Regional Director for the Fourth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Fourth Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. March 13, 1963.

Frank W. McCulloch, Chairman
Philip Ray Rodgers, Member
Boyd Leedom, Member
John H. Fanning, Member
Gerald A. Brown, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

*In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX B

141 NLRB No. 57 D-5166
Columbus, Miss.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 26-CB-165

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 624 A-B (D. S. McClanahan & Son, Inc.)

and

ROBERT WALKER, An Individual

NATIONAL LABOR RELATIONS BOARD

DECISION AND ORDER

On June 13, 1962, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. He also found that the Respondent had not engaged in other unfair labor practices and recommended that the complaint be dismissed as to them. Thereafter, the General Counsel and the Respondent filed exceptions to the Intermediate Report and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent that they are consistent with our Decision herein.[2]

The complaint alleged that Respondent maintained and enforced an arrangement, understanding, or practice with McClanahan requiring clearance or referral by Respondent as a condition of employment at McClanahan's project in Hamilton, Mississippi; that Respondent violated Section 8(b)(2) and (1)(A) by refusing to clear Robert Walker for employment with McClanahan in June of 1961 because he had opposed the election of incumbent Union officers; and, that Respondent further violated that Section by refusing to register Walker for employment with McClanahan and other employers on and after July 1, 1961, because of his engagement in the foregoing protected concerted activity. The Trial Examiner concluded that no exclusive hiring arrangement, understanding, or practice existed between Respondent and

[1]Respondent's request for oral argument is hereby denied as, in our opinion, the record, including the exceptions and briefs, adequately presents the issues and positions of the parties.

[2]Chairman McCulloch and Member Fanning, for the reasons set forth in the majority opinion in *Isis Plumbing & Heating Co., 138 NLRB No. 97*, include the payment of 6% interest per annum on the award of back pay ordered herein. However, for the reasons given in his dissent in that case, Member Rodgers would not grant any interest here.

McClanahan or any other employer. He therefore dismissed the complaint insofar as it alleged that Respondent violated the Act by refusing to register Walker for employment with McClanahan or any other employer after July 1. The Trial Examiner did find, however, that Respondent unlawfully discriminated against Walker when it refused to refer him for work with McClanahan on and after June 19 because of his intra-union activities.*

We adopt the Trial Examiner's finding that Respondent violated Section 8(b)(2) and (1)(A) by its refusal to refer Walker in June of 1961. We also agree that Respondent did

* The Trial Examiner's Intermediate Report contained the following:
"During 1961 Walker began a campaign to be elected as the Respondent's recording-corresponding secretary. The campaign, it developed, was to be a lengthy one and, as these pages are being written, it has not been concluded. On May 16, 1961, shortly before Walker sought employment with the Company, at a meeting at which candidates were to be qualified, Robert Byrd ruled that Walker was unqualified to run. The ground advanced then or later was that Walker had been in arrears in his dues and had not attended the necessary number of union meetings to qualify as a candidate. Later that month, Walker appealed to the Respondent's executive board. At about the same time, Speed suggested to Stanley Byrd that Walker be referred for employment with the Company, whose operations at the Hamilton project were to begin soon, and Byrd answered that, 'as far as Bobby Walker is concerned he can starve to death for my part.' On June 11, Walker lost his grievance before the Respondent's executive board. He promptly filed an appeal to the general executive board of the International Union. About June 20, the election was held. Walker's name was not on the ballot. Succeeding events, insofar as they need be recited, are that Walker enlarged the appeal by seeking to set aside the results of the election on the ground that he had been improperly disqualified as a candidate, the appeal was scheduled for hearing in Washington, D. C., Walker was notified but failed to attend, the general executive board denied the appeal on September 13. Walker filed a complaint with the Secretary of Labor under 29 U.S.C., Sec. 482, and about April 1962 the issues were settled by an agreement between the Respondent, the International Union, and the Department of Labor whereby the election of June 20, 1961, would be set aside, new nominations open to the membership of the Respondent would be made on May 15, 1962, and a new election would be conducted on June 19, 1962, for the unexpired terms of the officers who had been elected during June 1961."

not violate that Section by refusing to register Walker for employment with employers other than McClanahan because there is no record evidence that any exclusive hiring arrangement, understanding, or practice existed between Respondent and such other employers pursuant to which Walker was denied employment with them. Contrary to the Trial Examiner, however, we conclude and find that Respondent and McClanahan maintained and enforced a tacit arrangement or implicit understanding which required clearance or referral by Respondent as a condition of employment with McClanahan, and that Respondent acted unlawfully when it refused to register Walker for work with this employer after July 1.†

McClanahan is a subcontractor which employs operating engineers. The record shows that the entire project in question is a "union job," that is, only "union" craftsmen are employed. All operating engineers who worked for McClanahan at the project were members of Respondent. During the period from 1956 to 1959, McClanahan had dealt with Respondent on an exclusive basis. According to Speed, Respond-

†The Trial Examiner's Intermediate Report contained the following:

"The Respondent and the Company are not parties to a written collective labor agreement, and the testimony of their representatives is that they are not parties to an oral agreement covering the Company's operations at any project. Nevertheless, it is the Company's practice, whenever it is in need of engineers, to call the branch office of the Respondent nearest the project where men are needed. That practice, coupled with the fact that the Company required clearance by the Respondent for all engineers employed by it on the Hamilton project, will not, however, warrant a finding of unfair labor practices by the Respondent. The Company is not a party to this proceeding and is not alleged to have violated the Act."

ent's assistant business representative at that time. Respondent and McClanahan arrived at an oral agreement under which the latter agreed to contact Respondent whenever in need of operating engineers and to require that the engineers it then employed be members of Respondent. The agreement further provided that McClanahan would look exclusively to Respondent for the supply of men, and only when Respondent was unable to refer them was McClanahan permitted to seek employees elsewhere. Even in these circumstances, McClanahan was obligated to require that the new employees join Respondent.

When McClanahan commenced work on the Hamilton project in mid-1961, the manner in which it recruited operating engineers was strikingly similar to the agreement and practice with Respondent outlined above. Thus, even before McClanahan bid on the job, it inquired of Respondent about the availability of engineers. When the bid was let, McClanahan called Respondent about furnishing men. Respondent replied that "the Meridian office [Respondent's office in the area of the project] had always handled the furnishing of the people out there" and assured McClanahan that an agent "would look after that portion of it." McClanahan's project superintendent Forrester conceded that it was the general practice at the project to telephone Respondent's office when

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As the Trial Examiner noted, Speed's testimony was not wholly clear as to the precise terms of the oral agreement reached between Respondent and McClanahan sometime during the period between 1956 and 1959. However, that testimony serves to corroborate the existence of the arrangement or practice which is shown by other evidence in the record.

in need of men, and to require that they produce a referral slip from Respondent as a condition of employment.

Against this array of record facts, we are hard-pressed to accept the Trial Examiner's conclusion that no arrangement, understanding, or practice existed pursuant to which Respondent became the exclusive source of supply of engineers for employment with McClanahan. In view of the facts that McClanahan obligated itself to look exclusively to Respondent for the supply of men from 1956 to 1959; that McClanahan requested that Respondent furnish engineers to staff the project requirements in mid-1961 and Respondent agreed to do so in the same manner that it "had always handled the furnishing of the people out there;" and that Respondent conceded it was the general practice to call the Respondent for men and to require that they produce a referral slip as a condition to obtaining work with McClanahan, we conclude that, at the very least, a tacit arrangement or implicit understanding existed between McClanahan and Respondent under which the latter functioned as the exclusive source of supply of engineers for the former. Accordingly, we find that, by refusing to register Walker for employment with McClanahan on and after July 1 because he engaged in protected concerted activities, i.e., his opposition to incumbent officials of Respondent, Respondent violated Section 8(b)(2) and (1)(A) of the Act.[4]

[4] *See Local 215, International Brotherhood of Electrical Workers, AFL-CIO (William De Paolo), 136 NLRB 1618; Cf. Columbia Broadcasting System, Inc., 119 NLRB 810.*

ORDER

The Board adopts as its Order the "Recommended Order" of the Trial Examiner with the modifications listed marginally below.*

Dated, Washington, D. C., March 20, 1963.

Frank W. McCulloch, Chairman
Philip Ray Rodgers, Member
John H. Fanning, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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*The Appendix attached to the Intermediate Report is hereby modified by deleting the words "60 days after its date" in the next to the last sentence of said notice and inserting in its place, the words "60 consecutive days from the date of posting * * *."

"Paragraph 1(a) of the "Recommended Order" and the corresponding portions of the Notice are hereby deleted and the following shall be substituted therefor:

"1. Cease and desist from:

(a) Causing or attempting to cause D. S. McClanahan & Son, Inc., or any other employer having a similar arrangement, understanding, or practice with Respondent, to refuse to hire a worker in violation of Section 8(a)(3) of the Act or otherwise to discriminate against employees or applicants for employment in violation thereof, or maintaining or enforcing any such arrangement, understanding, or practice under which workers are denied registration for employment with employers in violation of Section 8(a)(3) of the Act."